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ABSTRACT

Fourth of a series of six reports, this report evaluates the Civil Rights activities of the Office of Revenue Sharing (ORS) of the Department of the Treasury. It is based on a review of documents produced by that Office, interviews with federal officials, and an analysis of available literature. The stated purpose of this report is to determine how well the Office of Revenue Sharing has done its civil rights enforcement job, from its creation in January 1973 until October 1974. Highlights of the findings of this report include the following: ORS civil rights compliance program is found to have been fundamentally inadequate; abundant evidence indicates that discrimination in the employment practices and in the delivery of benefits of State and local Government programs is far reaching, often extending to activities funded by general revenue sharing; ORS has been one of the most poorly staffed and funded civil rights compliance programs in the federal government; ORS has not done what it could to make its civil rights compliance effort most effective; and, since general revenue sharing is not only a massive federal program but represents an important new form of federal assistance, it is necessary that the federal government enforce non discrimination in activities made possible by this assistance. (Author/JM)

ED107756

THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT--1974

Volume IV
To Provide Fiscal Assistance

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
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A Report of the United States
Commission on Civil Rights
February 1975

UD015319

U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 to:

Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;

Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;

Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;

Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and

Submit reports, findings, and recommendations to the President and the Congress.

Members of the Commission:

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Robert S. Rankin
Manuel Ruiz, Jr.
Murray Saltzman

John A. Buggs, Staff Director

LETTER OF TRANSMITTAL

U.S. COMMISSION ON CIVIL RIGHTS
WASHINGTON, D.C., FEBRUARY 1975

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

SIRS:

The Commission on Civil Rights presents this report to you pursuant to Public Law 85-315, as amended. This report evaluates the civil rights activities of the Office of Revenue Sharing (ORS) of the Department of the Treasury. It is based on a review of documents produced by that Office, interviews with Federal officials, and an analysis of available literature. A draft of this report was submitted to the Office of Revenue Sharing for review and comment prior to publication.

We have concluded in this report that ORS' civil rights compliance program has been fundamentally inadequate. Abundant evidence indicates that discrimination in the employment practices and in the delivery of benefits of State and local government programs is far-reaching, often extending to activities funded by general revenue sharing. Nonetheless, ORS has one of the most poorly staffed and funded civil rights compliance programs in the Federal Government. Moreover, ORS has not taken the few actions possible within the constraints of its resources which would have made its civil rights compliance effort maximally effective.

We recommend that the President request significant increases in funds and staff for the civil rights compliance program under general revenue sharing. We have asked the President to direct a marked restructuring of that program, which would delegate responsibility for monitoring civil rights compliance under general revenue sharing to Federal agencies with analogous duties and give the Department of Justice the lead role in the development of Government-wide standards for this coordinated approach.

We believe that only if these steps are taken can a strong civil rights effort under general revenue sharing be developed. General revenue sharing is not only a massive Federal program but it represents an important new form of Federal assistance. It is, therefore, imperative that the Federal Government make clear its intention to ensure nondiscrimination in activities made possible by this assistance.

We urge your consideration of the facts presented and ask for your leadership in ensuring implementation of the recommendations made.

Respectfully,

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Robert S. Rankin
Manuel Ruiz, Jr.
Murray Saltzman

John A. Buggs, Staff Director

THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT--1974

Volume IV

To Provide Fiscal Assistance

A Report of the United States
Commission on Civil Rights
February 1975

PREFACE

In October 1970 the Commission published its first across-the-board evaluation of the Federal Government's effort to end discrimination against American minorities. That report, The Federal Civil Rights Enforcement Effort, was followed by three reports, in May 1971, November 1971, and January 1973, which summarized the civil rights steps taken by the Government since the original report. The Commission is presently in the process of releasing its most comprehensive analysis of Federal civil rights programs. We have already published the first three volumes of that study: those on the regulatory agencies, the agencies with fair housing responsibilities, and those concerned with equal educational opportunity. In the next few months we will publish reports on Federal civil rights efforts in the areas of employment, federally-assisted programs, and policymaking. While our report on the Office of Revenue Sharing of the Department of the Treasury was originally scheduled to be released as part of the report on federally assisted programs, we have decided to publish it separately because we wanted to be sure that our findings and recommendations could be considered by the President, the Congress, and the American people during the course of the discussion accompanying the attempts in Congress to extend the life of the general revenue sharing program.

This civil rights enforcement study was begun in November 1972. As we have done with all previous Commission studies of the Federal enforcement effort, detailed questionnaires were sent to agencies, extensive interviewing of Washington-based civil rights officials took place, and a vast number of documents were reviewed, including laws, regulations, agency handbooks and guidelines, compliance reports, and books and reports authored by leading civil rights scholars. Volumes of data were also analyzed from sources including the census, agency data banks, and complaint investigations.

This is the first of our studies on Federal enforcement activities to cover the Government's efforts to end discrimination based on sex. The Commission's jurisdiction was expanded to include sex discrimination in October 1972. Information on sex discrimination is an integral part of each section of this study.

To assure accuracy of this report, before final action the Commission forwarded a copy in draft form to the Office of Revenue Sharing to obtain its comments and suggestions. The response was helpful, serving to correct minor factual inaccuracies, clarify points which may not have been sufficiently clear, and provide updated information on activities undertaken subsequent to Commission staff investigations. In cases where ORS expressed disagreement with Commission interpretations of fact or with the views of the Commission on the desirability of particular enforcement or compliance activities, its point of view, as well as that of the Commission, has been noted.* In its comments, ORS provided new information not made available to Commission staff during the course of its interviews and investigations. Sometimes, the information was inconsistent with the information provided earlier. Although it was not always possible to evaluate this new information fully or to reconcile it with what was provided earlier, in the interest of assuring that agency compliance and enforcement activities are reported as comprehensively as possible, the new material has been noted in the report.

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* After reviewing the draft report, the Director of ORS wrote to this Commission's staff director:

> We believe the draft report raises basic questions of construction and interpretation of the Revenue Sharing Act. Needless to say, our interpretations in many instances differ from yours. The Treasury Department monitored closely the legislation, hearings and testimony on the bill which was eventually enacted by the Congress. Accordingly, we believe with some justification that our construction and interpretation is entitled to substantial weight....
>
> In the light of our operational experience since the Revenue Sharing Act was signed in October 1972, we found worthy of serious consideration many of the comments and criticisms which the draft report contains on ORS regulations on discrimination. In those areas where our experience has shown that our regulations are weak, we intend to take the necessary action to strengthen them. In this respect, we have received much valuable assistance not only from the Civil Rights Commission, but also the various civil rights organizations. We are continuously reviewing our discrimination regulations and appropriate modifications will be made in those instances where, in our judgment, our regulations can be strengthened and our enforcement made more positive. Letter from Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Jan. 20, 1975.

This report does not deal primarily with the substantive impact of civil rights laws. The Commission will not attempt here to measure precise gains made by minority groups members and women as a result of civil rights actions of the Office of Revenue Sharing. Rather, we have attempted to determine how well the Office of Revenue Sharing has done its civil rights enforcement job--from its creation in January 1973 until October 1974.

Acknowledgments

The Commission is indebted to Ellerbe P. Cole, who wrote this report under the direction of Cynthia Norris Graae, Associate Director, Office of Federal Civil Rights Evaluation.

The report was prepared under the overall supervision of Jeffrey M. Miller, Assistant Staff Director for Federal Civil Rights Evaluation. The following staff members and former staff members provided support in the preparation of this report: Margret Anderson, Mary V. Avant, Jeanette R. Binstock, Randall D. Briggs, Alice R. Burruss, Patricia A. Cheatham, Wallace Greene, Jeanette M. Johnson, Joyce M. Long, Alfonso E. Mirabal, Grenda L. Morris, Penny K. Smith, Rudella J. Vinson, Mary V. Watson, Brenda A. Watts, and Rita L. Young.

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Chapter I

Program and Civil Rights Responsibilities

On October 13, 1972, the Congress passed the State and Local Fiscal Assistance Act of 1972,[1] a program of general revenue sharing (GRS). GRS is, simply stated, a method of transferring money from the Federal Government to almost 39,000 eligible State and local governments.[2] The Act, in one of the largest single domestic appropriations in American history, appropriated $30.2 billion[3] for aid to State and local governments covering the five year period from January 1, 1972, through December 31, 1976.[4] As of October 4, 1974, $15.82 billion had been distributed under the Act.[5]

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[1] The State and Local Fiscal Assistance Act of 1972 was signed by the President on October 20, 1972, 31 U.S.C. §§ 1221-1263 (Supp. III, 1973) and 26 U.S.C. §§ 6017A and 6687 (Supp. III, 1973) /hereinafter referred to as the Act/.

[2] All general purpose units of government, including States, counties, townships, municipalities, and the recognized governing bodies of Indian tribes and Alaskan native villages which perform substantial governmental functions, are eligible to receive GRS funds. Ineligible are "special purpose" districts such as public school districts, water or sewer districts, and library districts. Special purposes districts may, however, be eligible to receive GRS funds indirectly, as States and local governments can pass on any or all of their entitlements to special purpose districts.

[3] The $30.2 billion was appropriated "out of amounts in the general fund of the Treasury attributable to the collections of the Federal individual income taxes not otherwise appropriated." 31 U.S.C. § 1224(b)(1) (Supp. III, 1973).

[4] Continuation of funding beyond this time will require congressional action. The Congress intends that there will be a review of financial problems of State and local governments prior to that time so that provisions can be made for any necessary changes, if funding is to be renewed. Staff of Joint Comm. on Internal Revenue Taxation, General Explanation of the State and Local Fiscal Assistance Act and the Federal-State Tax Collection Act of 1972, H.R. 14370, 92d Congress, Public Law 92-512 9 (Feb. 12, 1973) [hereinafter referred to as General Explanation].

[5] Office of Revenue Sharing, Department of the Treasury, News release, "Office of Revenue Sharing Issues October Payment," Oct. 4, 1974.

There is general agreement that the purpose of this Act is twofold: to shift decisionmaking on how best to solve State and local problems to State and local officials and to provide revenues to aid States and local governments.[6] Congress devised formulas for distribution of funds to States and, within each State, to local units of government,[7] and provided for payments to be made directly to eligible recipient governments by the Secretary of the Treasury, who was charged with administering the general revenue sharing program.[8]

General revenue sharing funds may be applied to almost any type of program or activity in which State governments may use their own funds[9] but may be spent by local governments only for certain

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[6] See Intergovernmental Relations Subcomm. of the House Comm. on Government Operations, Replies by Members of Congress to a Questionnaire on General Revenue Sharing, 93d Cong., 2d Sess. 6 (April 1974). Out of 172 responses to a question regarding the purposes of GRS, 73 members emphasized State and local decisionmaking while 48 members emphasized the financial effects of GRS. Four additional respondents stressed both points and another 47 members gave varying responses. Id. at 6-9. See also General Explanation, supra note 4, at 1-18. For an overview of the various rationales for GRS, see E.R. Fried, A.M. Rivlin, C.L. Schultze, and N.H. Teeters, Setting National Priorities: The 1974 Budget 266-89 (Brookings Institution, 1973).

[7] These formulas are discussed briefly at note 275 infra. For more detailed information see U.S. Commission on Civil Rights, Making Civil Rights Sense out of Revenue Sharing Dollars, February 1975.

[8] Among the responsibilities of the Secretary of the Treasury under the Act are the following: making entitlement payments to recipients; receiving from recipients certain certificates and reports; reporting annually to the Congress on the financial operations of GRS; providing for such accounting and auditing procedures, evaluations, and reviews as may be necessary to ensure that expenditures of GRS funds comply with the Act's requirements; issuing regulations as necessary for the administration of GRS; and enforcing compliance with the Act's requirements.

[9] Revenue sharing money must be spent in accordance with the laws and procedures applicable to a recipient government's own revenues. 31 U.S.C. § 1243(a)(4) (Supp. III, 1973).

"priority" expenditures. These are (a) ordinary and necessary maintenance and operating expenditures for public safety, environmental protection, public transportation, health, recreation, libraries, social services for the poor or aged, and financial administration, and (b) ordinary and necessary capital expenditures authorized by law.[10]

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[10] ORS has clarified the purposes for which GRS funds may be properly spent by State and local recipients. Office of Revenue Sharing, Department of the Treasury, General Revenue Sharing--the First Actual Use Reports 44-45, Appendix A (March 1974). Public Safety, for example, could include:

> Preservation of law and order, traffic safety, vehicular inspection, detention and custody of persons awaiting trial, crime prevention activities, and parole activities. Fire fighting organization, fire prevention, fire hazard inspection, fire hydrants, and equipment. Id. at 44.

Environmental protection/conservation could include:

> Restoration and protection of the environment including soil, water and air conservation. Sanitation services such as garbage collection and disposal, public incinerators. Sewage disposal including lines, laboratories, and disposal stations. Id.

Local governments are precluded from using GRS funds for operating and maintenance expenses for education because such expenditures are not embraced by any of the priority expenditure categories of the Act. In addition, GRS funds may not be used by local governments for direct cash welfare payments. See Office of Revenue Sharing, Department of the Treasury. One Year of Letter Rulings on General Revenue Sharing: A Digest II-5 (March 1974). One analyst of general revenue sharing has suggested that they were excluded in order to remove from the field of possible contenders for GRS funds two often well-organized and vocal groups with the ability to influence local officials in their spending decisions--welfare recipients and teachers, who might seek increased benefits or salaries. O.G. Stolz, Revenue Sharing: Legal and Policy Analysis 77 (1974). From December 1971 to December 1972, Mr. Stolz was Special Counsel to the Under Secretary of the Treasury. As Special Counsel, he was a close observer of the creation of general revenue sharing. He has since served as a consultant to the Department of the Treasury.

There are also a number of other requirements levied upon both State and local recipients.[11] Principal among these are:

(1) Recipients must not use GRS funds, directly or indirectly, to obtain Federal funds under Federal programs which require them to share in the program costs by matching the Federal share.[12]

(2) Recipients must send to the Secretary of the Treasury "planned use reports," indicating how they intend to spend the money, and "actual use reports," indicating how past entitlements have been spent, and must ensure newspaper publication of these reports.[13]

(3) Where 25 percent or more of the cost of a construction project is paid out of GRS funds, laborers and mechanics employed by contractors and subcontractors must be paid at least the prevailing wage rates on similar construction in the locality as determined under the Davis-Bacon[14] Act by the Secretary of Labor.[15]

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[11] The recipient government must also: (a) establish a trust fund for general revenue sharing funds; (b) use revenue sharing funds within a reasonable period of time; (c) use fiscal procedures conforming to guidelines established by the Secretary of the Treasury; and (d) if the recipient is the recognized governing body of an Indian tribe of Alaskan native village, spend revenue sharing funds for members of the tribe or village within the county area from which the funds were allocated. 31 U.S.C. § 1243 (Supp. III, 1973).

[12] 31 U.S.C. § 1223(a) (Supp. III, 1973).

[13] 31 U.S.C. § 1241 (Supp. III, 1973).

[14] 40 U.S.C. § 276a to 276a-5 (1970). This provision is applicable only where the cost of a project exceeds $2,000. Attachment 1 to letter from Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Jan. 20, 1975.

[15] 31 U.S.C. § 1243(a)(6) (Supp. III, 1973).

(4) Where 25 percent or more of the wages of a recipient government's employees in any category, such as policymakers or firefighters, are paid out of GRS funds, employees in that category must be paid not less than the prevailing wages paid by the recipient to persons employed in similar public occupations.[16]

(5) To avoid having States, upon receiving their funds, reduce their previous levels of transfers to local governments by the amount received by local governments, States must maintain the level of their own transfers of State funds to local governments.[17]

Perhaps the most significant requirement is that:

> No person in the United States shall on the grounds of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [the Act].[18]

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16. 31 U.S.C. § 1243(a)(7) (Supp. III, 1973).

17. 31 U.S.C. § 1226(b)(1) (Supp. III, 1973). Congress provided for adjustments to the rule governing transfers whenever States either (a) assumed responsibility for any category of expenditures for which local governments had been theretofore responsible or (b) conferred new taxing powers upon local governments. 31 U.S.C. §§ 1226(b)(2) and (3) (Supp. III, 1973).

18. 31 U.S.C. § 1242(a) (Supp. III, 1973).

The Act's prohibition against discrimination is similar to Title VI of the Civil Rights Act of 1964, which bans discrimination in federally-assisted programs.[19] This prohibition goes beyond Title VI, however, in two major ways: first, it prohibits sex discrimination: Title VI does not; and second, it prohibits discrimination in employment: Title VI prohibits employment discrimination only where employment is a primary objective of the Federal assistance program being administered.[20]

Moreover, the Act's provision for enforcement of this prohibition is also broader than provisions for enforcement of Title VI. The Act expressly authorizes the referral of cases by the Secretary of the Treasury to the Attorney General for appropriate legal action:[21] Title VI

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19. Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d (1970).

20. Title VI states:

> Nothing contained in this [title] shall be construed to authorize action under this [title] by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. 42 U.S.C. § 2000d-3 (1970).

The State and Local Fiscal Assistance Act of 1972 contains no such language. It should be noted that Title VI regulations prohibit employment discrimination to the extent necessary to assure equality of opportunity for beneficiaries. See 45 C.F.R. § 80.3(c)(3) (1974) (Department of Health, Education, and Welfare) and 24 C.F.R. § 1.4(c)(2) (1974) (Department of Housing and Urban Development).

21. 31 U.S.C. § 1242(b) (Supp. III, 1973)

does not.[22] The Act also provides that the Attorney General may sue directly under the Act, without referral from the Secretary, whenever he or she believes there exists a pattern or practice of unlawful discrimination:[23] the Attorney General is not assigned independent enforcement responsibilities under Title VI.

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[22] The Department of Justice (DOJ) has, nonetheless, been a participant in the enforcement of Title VI. That title provides that Federal agencies may seek to secure compliance through administrative proceedings or "by any other means authorized by law." Agency and departmental regulations usually enlarge on the quoted phrase. Department of Health, Education, and Welfare Title VI regulations, for example, state:

> Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceedings under State or local law. 45 C.F.R. § 80.8(a) (1974).

Moreover, in September 1965, the Attorney General was directed to coordinate Federal agency Title VI policies and procedures. Executive Order No. 11247, 3 C.F.R. 348 (1964-65 Comp.), 42 U.S.C. § 2000d-1 note (1970). Executive Order 11764, which superseded Executive Order 11247, strengthened the role of the Attorney General in ensuring uniformity of enforcement practices and procedures among Federal program agencies. Executive Order No. 11764, 39 Fed. Reg. 2575 (Jan. 23, 1974). For a discussion of the Title VI role of the Department of Justice, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. VII, ch. 1, (in preparation).

[23] 31 U.S.C. § 1242(c) (Supp. III, 1973).

The nondiscrimination provision of the State and Local Fiscal Assistance Act places all the responsibility on ORS which Title VI places on each Federal agency dispensing Federal assistance. Moreover, the revenue sharing Act specifically invokes Title VI as providing remedies for any violation of the revenue sharing Act's nondiscrimination provision. ORS nonetheless has stated that it is not a Title VI agency.[24]

As a result, ORS' strategy for ensuring compliance with the nondiscrimination provision of the State and Local Fiscal Assistance Act is less forceful than that of other Federal agencies under Title VI.[25] It's regulations are weaker and it fails to use mechanisms such as beneficiary data collection and preaward and postaward compliance reviews which are the core of Title VI programs.[26]

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[24] ORS' belief that it is not a Title VI agency is evidenced by its use of the phrase "even if ORS were a Title VI agency, which it is not." Attachment 2 to 1975 Watt letter, supra note 14.

[25] These agencies' execution of their strategies, however, is generally deficient. See U.S. Commission on Civil Rights. The Federal Civil Rights Enforcement Effort--1974, Vol. VI, Federally Assisted Programs (in preparation.)

[26] ORS' regulation is discussed on pp. 22-42 infra. The need for preaward and postaward compliance reviews is discussed on pp. 61-65 infra.

ORS makes it clear that it believes it should not be held to the same standards as other Title VI agencies. It has stated:

> Throughout the report we are concerned with the conflict between the statements that the Revenue Sharing Act's provisions for enforcement of the nondiscrimination prohibition differs from the provisions of enforcement of Title VI. In fact, the report finds many distinctions between the nondiscrimination provisions of the Act and Title VI, and we think those distinctions are well-taken. We are, therefore, somewhat concerned and mildly confused when a good portion of the report criticizes the ORS nondiscrimination regulation because it does not contain many of the standard phrases, and terminology of the Title VI regulations of other Federal grant agencies. We seem to detect some inconsistencies in these statements. 27

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27. Attachment to 1975 Watt letter, supra note 14. ORS also stated:

> We believe that the draft report acknowledges some of the broad implications of General Revenue Sharing as a new and innovative program by the sentence of the /third/ footnote of page /76 infra/ which states that "no other Federal agency offers assistance which can be used by fire departments on such a widespread basis." We believe the report recognizes, therefore, that GRS is a new and innovative program providing a new experiment in Federal - local government relationships. Id.

Although the State and Local Fiscal Assistance Act transferred much of the responsibility for expending these Federal funds from the Federal Government to State and local governments, there is every indication that the Federal Government intended to retain full responsibility for ensuring civil rights compliance in the expenditure of these funds. Regarding the prohibition of discrimination in GRS, President Nixon stated on three different occasions:

> The revenue sharing proposals I send to the Congress will include the safeguards against discrimination that accompany all other Federal funds allocated to the States. Neither the President nor the Congress nor the conscience of the Nation can permit money which comes from all of the people to be used in a way which discriminates against some of the people.... 28
>
> Of course, these revenue sharing proposals will not be the vehicle for any retreat from the Federal Government's responsibility to ensure equal treatment and opportunity for all.... 29
>
> The Federal Government has a well defined moral and constitutional obligation to ensure fairness for every citizen whenever Federal tax dollars are spent. Under this legislation, the Federal Government would continue to meet this responsibility. 30

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28. Office of the Federal Register, National Archives and Records Service, General Services Administration, Public Papers of the Presidents, Richard Nixon, 1971, Annual Message to the Congress on the State of the Union, Jan. 22, 1971, 50, 54 (1972) [hereinafter referred to as Public Papers of Richard Nixon.]

29. Id., Annual Budget Message to the Congress, Fiscal Year 1972, Jan. 29, 1971, 80, 85.

30. Id., Special Message to the Congress Proposing a General Revenue Sharing Program, Feb. 4, 1971, 113, 118.

Organization and Staffing

A. Organization

In January 1973, the Secretary established within the Department of the Treasury an Office of Revenue Sharing (ORS),[31] to be headed by a Director appointed by the Secretary.[32] The Secretary delegated to the Director all powers and responsibilities vested in the Secretary by the Act and instructed the Director to perform his or her duties under the immediate supervision of the Deputy Secretary of the Treasury.[33]

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[31] Treasury Department Order No. 224, "Office of Revenue Sharing, Establishment and Delegation of Authority," Jan. 26, 1973, 38 Fed. Reg. 3342 (Feb. 5, 1973) 31 C.F.R. § 51.1 (1974). An Office of Revenue Sharing had been formed, however, in the Office of the Secretary of the Treasury at least as early as October 20, 1972. See Office of Revenue Sharing, Department of the Treasury, Annual Report 5 (March 1, 1974) [hereinafter referred to as Annual Report].

[32] On February 1, 1973, George P. Shultz, then Secretary of the Treasury, appointed Graham W. Watt to be Director of ORS. Mr. Watt had previously served as City Manager of Alton, Illinois; Portland, Maine; and Dayton, Ohio. In 1969, President Nixon appointed him Deputy Mayor of the District of Columbia. He also served as Director and Vice-Chairman of the Metropolitan Washington Council of Governments. He is a member of the National Academy of Public Administration and a past President of the International City Management Association (ICMA).

[33] Treasury Department Order No. 224, supra note 31. The Secretary's responsibilities are enumerated in note 8 supra.

Since January 1973, the Department of the Treasury has effected a reorganization and as of January 1975 the ORS Director reported to the Under Secretary who in turn reported to the Deputy Secretary.[34]

The primary responsibilities of the Office of Revenue Sharing are to provide eligible governments with their entitlement checks and to ensure that these governments, in turn, comply with the requirements of the Act. As of October 1974 ORS' organization was as shown in Figure 1.[35] All ORS operations are based in Washington--it has no field offices.

Reporting to the Director are the Deputy Director and the four offices of Administration, Program Planning and Coordination, Public Affairs, and the Chief Counsel. The function of the Administration Office is to management personnel, budget, and office services. The Office of Program Planning and Coordination oversees contracts for special research projects requested by the Director and manages ORS' program planning system. The Office of Public Affairs provides information about GRS to the public, the media, citizens groups, other Federal agencies,

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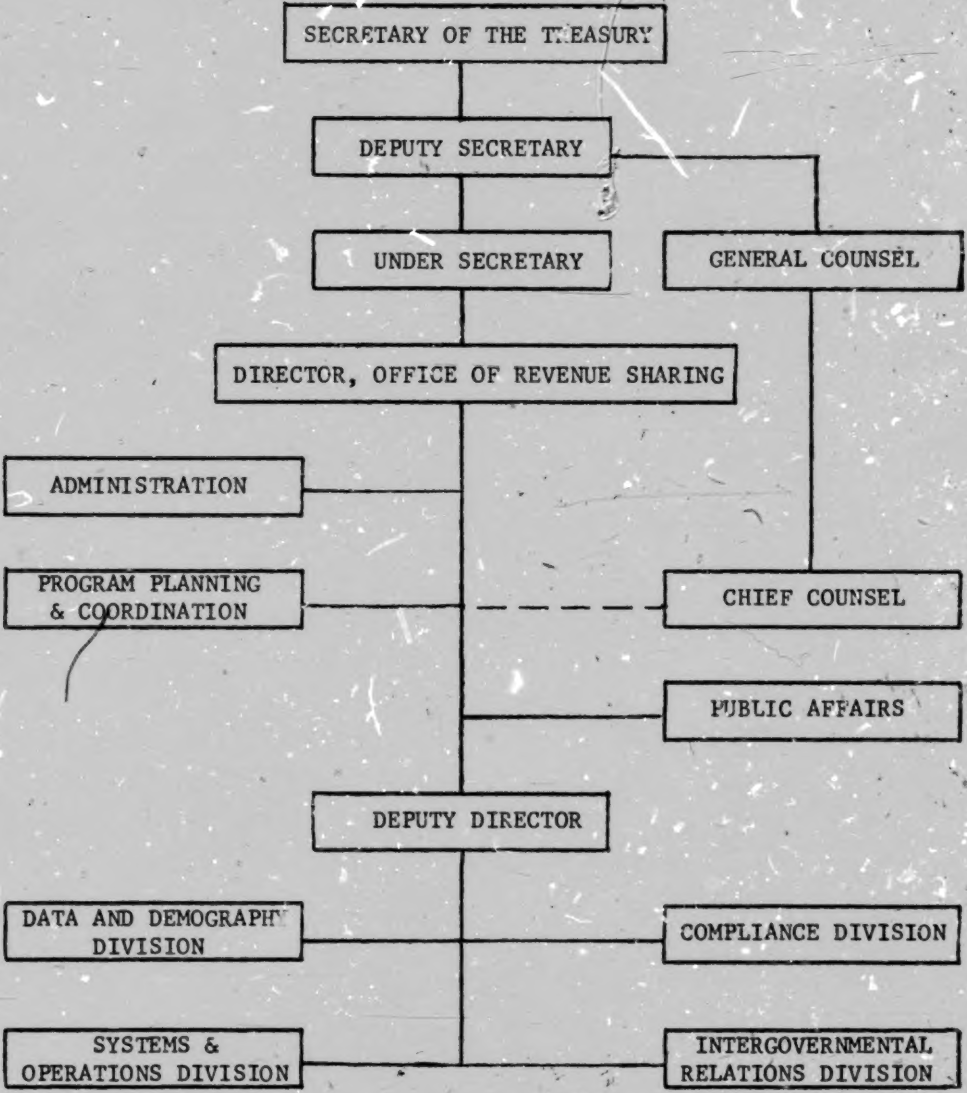
[34] Attachment 1 to 1975 Watt letter, supra note 14.

[35] This organization is essentially the same as that tentatively established in May 1973. See Office of Revenue Sharing, Department of the Treasury, "Tentative Organization Based on Proposed Staffing Plan FY-1974," May 4, 1973. For the first six months of its existence, ORS utilized staff from elsewhere in the Department of the Treasury and from other agencies for such activities as drafting interim regulations and conducting compliance surveys.

FIGURE 1

ORGANIZATION OF THE
OFFICE OF REVENUE SHARING
DEPARTMENT OF THE TREASURY


SECRETARY OF THE TREASURY
DEPUTY SECRETARY
UNDER SECRETARY
GENERAL COUNSEL
DIRECTOR, OFFICE OF REVENUE SHARING
ADMINISTRATION
PROGRAM PLANNING & COORDINATION
CHIEF COUNSEL
PUBLIC AFFAIRS
DEPUTY DIRECTOR
DATA AND DEMOGRAPHY DIVISION
COMPLIANCE DIVISION
SYSTEMS & OPERATIONS DIVISION
INTERGOVERNMENTAL RELATIONS DIVISION

research groups, and the Congress. The Office of the Chief Counsel, which is technically part of the staff of the Office of General Counsel at the Department of the Treasury, interprets the State and Local Fiscal Assistance Act of 1972 and other laws in relation to it, issues opinion letters, writes regulations, and represents ORS in legal matters concerning the GRS program.[36]

Reporting to the Deputy Director are four divisions: Data and Demography, Systems and Operations, Intergovernmental Relations, and Compliance. The Data and Demography Division is responsible for acquisition of data used in computing fund allocations and for conducting programs to improve these data. The Systems and Operations Division performs the actual computations of fund allocations, writes payment vouchers, and produces computer-generated communications and publications. The Intergovernmental Relations Division is responsible for providing technical advice and assistance to State and local governments and for maintaining liaison with public interest groups.[37] The Compliance Division is responsible for ensuring compliance by all recipient governments with all of the Act's requirements, including the civil rights requirement. It is to conduct audits and investigations of recipients and undertake cooperative compliance programs with other Federal agencies, State governments, and national associations of governmental and civil rights organizations. In January 1975,

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[36] Annual Report, supra note 31 at 27 and 29.

[37] Id. at 27 and 29.

ORS informed this Commission that it sometime earlier established a Civil Rights Branch[38] of the Compliance Division. Every previous indication from ORS was that rather than establish such a branch ORS would attempt to incorporate civil rights concerns into the responsiblities of the staff of the Compliance Division,[39] training all compliance staff in civil rights.[40]

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[38] 1975 Watt letter, supra note 14.

[39] In 1973 ORS stated that it would not establish a separate civil rights program. Interview with John K. Parker, Deputy Director, Office of Revenue Sharing, Department of the Treasury, July 9, 1973. ORS has stated that "all compliance areas tend to be interrelated, and therefore should be treated together." Attachment to letter from John K. Parker, Deputy Director, Office of Revenue Sharing, Department of the Treasury, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, Aug. 15, 1974.

ORS also stated of the members of the compliance staff:

> ...although each is not a "civil rights specialist," the work of every one is directly related to our civil rights compliance activities. For example, all audits include civil rights compliance, and all civil rights complaints are audited, with our audit staff gathering as much information as feasible on civil rights as well as other situations of noncompliance. Hearings on Revenue Sharing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93d Cong., 2d Sess., pt. 1, at 52 (1974) [hereinafter referred to as Revenue Sharing Hearings].

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[40] The Director of ORS stated that the entire compliance staff "is being or will be trained in civil rights." *Revenue Sharing Hearings*, *supra* note 39 at 52. ORS' own files appear to underscore the need for such training. A memorandum appearing in an ORS complaint file recited that:

> We cannot be bound by [the ORS auditor's] statement that the City used standard tests and as long as no Blacks passed, discrimination cannot exist. Likewise, the statement that discrimination can only exist in the use of funds in this instance if the fire truck purchased with revenue sharing funds were used only to put out fires of Whites is in error. Memorandum from Malaku J. Steen, Civil Rights Specialist, Office of Revenue Sharing, Department of the Treasury, to Robert T. Murphy, Compliance Manager, Office of Revenue Sharing, Department of the Treasury, August 16, 1973.

As recognized by ORS, the auditor's first statement is incorrect. A test may be "standard," i.e., the same test may be given under the same conditions to all applicants, regardless or race, color, national origin, or sex, and yet be a demonstrably poor predictor of the true ability of the examinee to perform the job for which he or she has applied. To ensure that a test is a good predictor of job performance it must be validated. In the absence of validity, a test may operate unfairly to disqualify from particular employment a whole class of people, e.g., women or Native Americans. Griggs v. Duke Power Co. 401 U.S. 424 (1971). For a discussion of test validation, see U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort--1974*, Vol. V, ch. 4 (in preparation

The second statement of the auditor, that discrimination could only exist in the use of funds in the case under discussion if the fire truck purchased with GRS funds were used to put out fires of whites, is incorrect because it understates the breadth of the prohibition of discrimination under GRS. It appears that unlawful discrimination would exist in the complaint discussed by the auditor if there were discrimination in any form on the basis of race, color, national origin, or sex in any aspect of the fire department or its operations, whether in employment or in the provision of fire protection and firefighting services, regardless of whether such employment or operations were related to the particular use made within the fire department of GRS funds. Thus, although in the case under consideration GRS funds were apparently used only for a fire truck, any discrimination against classes protected by the Act in either employment or provision of services would constitute a violation of the Act. The broad scope of the Act's prohibition has been acknowledged by ORS officials in Commission interviews, e.g., interview with William H. Sager, Chief Counsel, Andrew S. Coxe, Deputy Chief Counsel, and Malaku J. Steen, Civil Rights Specialist, Office of Revenue Sharing, Department of the Treasury, July 17, 1974; interview with Malaku J. Steen, Civil Rights Specialist, and Minerva Lopez, Equal Opportunity Specialist, Compliance Division, Office of Revenue Sharing, Department of the Treasury, Feb. 13, 1974. See also, Office of Revenue Sharing, Department of the Treasury, *General Revenue Sharing and Civil Rights* 1, 13 (November 1974).

B. Staffing

President Nixon, in proposing his general revenue sharing plans, promised that GRS would be administered without the creation of massive new agencies.[41] ORS has followed this lead, and has administered the Act with a very small staff indeed.[42] Shortly before the outset of fiscal year 1974, after all retroactive payments for 1972[43] had been made and after the issuance of entitlement checks for the first quarter of calendar year 1973, ORS' staff consisted of 41 persons--25 professional and 16 clerical. By June 1, 1974, it numbered 68 persons--43 professional and 25 clerical and support,[44] only 4 fewer than ORS proposed to hire.[45]

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[41] Public Papers of Richard Nixon, supra note 28, at 118.

[42] Graham W. Watt, Director, Office of Revenue Sharing, has stated that "we are determined not to absorb large amounts of the taxpayers' money just to return money to their communities." Revenue Sharing Hearings, supra note 39, at 28.

The ratio of staff size to dollars administered by ORS contrasts sharply with other Federal programs. For example, the Federal Aid-Highway program of the Department of Transportation annually administers about $4 billion in grants. The fiscal year 1974 budget provided for an estimated 1,700 permanent positions for that program. Using $6 billion as the amount annually administered by ORS, the number of staff per billion dollars administered by the highway program was 425 to 1; for GRS it was 11.3 to 1.

[43] Although the Act was passed in October 1972, it provided for payments retroactive to January 1, 1972.

[44] Data supplied by ORS at interview with Robert T. Murphy, Compliance Manager, and Malaku J. Steen, Civil Rights Specialist, Compliance Division, Office of Revenue Sharing, Department of the Treasury, Oct. 23, 1974. This total does not include persons assigned to ORS from the Office of the General Counsel of the Department of the Treasury. In June 1974 there were 9 persons so assigned--6 attorneys and 3 support personnel. Revenue Sharing Hearings, supra note 39, at 28.

[45] See Table 1, p. 18 infra.

TABLE 1

Office of Revenue Sharing Employment

	a / Proposed Fiscal Year 1974	b / Actual June 1, 1974	c / Proposed Fiscal Year 1975
Office of the Director	5	5	5
Administration	3	4	5
Program Planning and Coordination	2	2	3
Public Affairs	2	2	3
Data and Demography	7	7	9
Intergovernmental Relations	11	12	17
Systems and Operations	16	17	28
Compliance	26	19	51
	72	68	121 d /

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a / Source: Office of Revenue Sharing, Department of the Treasury, Table "Tentative Organization Based on Proposed Staffing Plan FY-74" May 4, 1973.

b / Source: Statement of Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, Hearings on Revenue Sharing Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93d Cong., 2d Sess., pt. 1, at 28 (1974).

c / *Id.*

d / It should be noted that this table does not include the Office of Chief Counsel which was staffed entirely of Office of General Counsel personnel from the Department of the Treasury. This total would be 130 assuming continued staffing of the Office of Chief Counsel at the June 1, 1974, level.

At that time, the Compliance Division was the only ORS division which was not staffed at or above the level proposed for fiscal year 1974. ORS had proposed that this division have a staff of 26, and since November 1973 it had had authority for a staff of 25.[46] In June 1974 it had on board, however, a staff of only 19.[47]

As of mid-October 1974, with 28 of the 30 authorized positions in ORS' Compliance Division filled, only 4 were occupied by full-time civil rights compliance officers.[48] Moreover, for more than a year, until February 1974, ORS had only one full-time civil rights employee.[49] Furthermore, even though ORS estimated the 15 auditors in the compliance division spent a total of 5 person-years annually on civil rights,[50] ORS' allocation of staff resources is far too low.[51] This low level of staffing is especially striking in view of ORS' statement that:

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[46] Congressional action on the fiscal year 1974 budget request for ORS was not taken until November 1973, when there were 5 staff members in the compliance division. In November 1973, the compliance division was given authority to hire 20 additional staff members. 1974 Murphy and Steen interview, supra note 44.

[47] Revenue Sharing Hearings, supra note 39. The Compliance Manager indicated that although there were only 19 members of the compliance division, probably there were several people who were hired but not on board. He also stated that it "takes time to find quality people." 1974 Murphy and Steen interview, supra note 44.

[48] Telephone interview with Malaku J. Steen, Civil Rights Specialist, Office of Revenue Sharing, Department of the Treasury, Dec. 13, 1974. Mr. Steen, who is one of the four civil rights compliance officers, supervises the other three. He is also responsible for assuring compliance with the Davis-Bacon requirement of the Act. Id. As of January 1975, ORS had five "slots" for professionals in the Civil Rights Branch. Attachment 1 to 1975 Watt letter, supra note 14.

[49] One full-time civil rights employee was added in February 1974 and two more sometime before mid-fall 1974.

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[50] 1974 Murphy and Steen interview, supra note 44.

[51] ORS' assignment of 4 full-time professionals to oversee civil rights compliance by 39,000 recipients contrasts sharply with the workload of civil rights compliance staffs in other Federal agencies. For example, in 1974, there were 116 professional staff members employed in the Elementary and Secondary Education Division of the Office for Civil Rights of the Department of Health, Education, and Welfare. Their compliance responsibilities extended to about 17,000 school districts. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity, ch. 1 (January 1975). Similarly, the Office of Equal Employment Opportunity of the Manpower Administration of the Department of Labor employed 32 full-time equal opportunity specialists with compliance responsibilities for about 50 State employment security agencies and a variety of smaller manpower training programs. The Urban Mass Transportation Administration of the Department of Transportation employed a professional civil rights staff of 17 although it makes under 150 grants annually. The Health and Social Services Division of the Office for Civil Rights of the Department of Health, Education, and Welfare employed 81 professionals to oversee civil rights compliance by about 28,000 recipients including hospitals, home health care agencies, nursing homes, and State health and welfare agencies. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. VI, Federally Assisted Programs (in preparation).

> The compliance responsibilities of ORS exceed by orders of magnitude those placed on other agencies. Thus: (a) the dollar value, and hence scope of compliance responsibilities ($30.2 billion), is the largest single Federal program in operation; (b) recipients exceed by perhaps ten times the number of recipients of any one other Federal domestic agency; (c) ORS funds are frequently co-mingled with other funds of State and local governments, and in civil rights matters at minimum, ORS takes jurisdiction over the entire program areas funded. It would not be unreasonable to estimate that ORS has civil rights jurisdiction over some $100 billion of Federal, State and local funds. 52

Responsibility for the fact that there are so few civil rights staff as opposed to auditors within the Compliance Division lies with the Compliance Division itself, as the number of persons assigned to civil

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52. Attachment to Parker letter, supra note 39.

rights activities by ORS is decided by the Manager of the Compliance Division in conjunction with the lead civil rights staff member.[53]

ORS' civil rights compliance staff is plainly inadequate to the task. ORS reports that it lacks sufficient staff to conduct regularly scheduled compliance reviews.[54] Although there was reportedly no backlog in ORS' complaints processing operations as of September 1973, a backlog had developed by February 1974 and was still in existence as of June 1974.[55] Moreover, although ORS had plans for internal processing controls to ensure a more timely initial response to complaints received, the controls had not been implemented on a regular and consistent basis as of February 1974, primarily for lack of personnel.[56]

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53. 1974 Murphy and Steen interview, supra note 44.

54. Telephone interview with Robert T. Murphy, Compliance Manager, Office of Revenue Sharing, Department of the Treasury, Oct. 18, 1974.

55. Steen interview, supra note 40. ORS commented:

> We believe it unfortunate that you selected February 1974 as a reference date in the first full paragraph on p. [21]. This date - whether selected by accident or by design - is the date that reflects most adversely on the ORS Compliance program. On that date, ORS had its largest backlog accumulation of complaints. During that month the ORS staff was being hired and beginning to come on board. However, the new staff members had no opportunity at that point to make any input to the Compliance program. Attachment 2 to 1975 Watt letter, supra note 14.

In June 1974 only 18 of 41 complaints had been resolved. See pp. 72-73 infra.

56. Steen interview, supra note 40.

Chapter III

Regulation

The portions of ORS's regulation[57] relating to civil rights extensively resemble existing agency Title VI regulations.[58] They do not, however, include a number of provisions common to Title VI regulations.[59] The ORS regulation thus presents a weaker explanation of administrative interpretations of the GRS prohibition of discrimination[60] than do Title VI regulations of the Title VI prohibition. ORS' regulation does not include, for example:

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[57] 31 C.F.R. §§ 51.0 *et seq.* (1971). This regulation pertains to the administration of the entire Act, not merely the civil rights provisions.

[58] Title VI regulations for twenty-one principal agencies were published as early as December 1964 and January 1965, see 29 *Fed. Reg.* No. 236 (Dec. 4, 1964), No. 254 (Dec. 31, 1964), and 30 *Fed. Reg.* No. 6 (Jan. 9, 1965). Title VI regulations were most recently amended, uniformly, at 38 *Fed. Reg.* No. 128 (July 5, 1973).

[59] A comparison of Title VI regulations with ORS' regulation is not intended to imply that Title VI regulations are entirely free of deficiencies. Some of the inadequacies of Title VI regulations will appear from a comparison of the regulations with letters from Harold C. Fleming, Chairman, Task Force on Federal Program Coordination, Leadership Conference on Civil Rights, to David L. Norman, Assistant Attorney General, Civil Rights Division, Department of Justice, Jan. 4, 1972; letter from Richard T. Seymour, Staff Attorney, Washington Research Project, to Mr. Norman, Feb. 4, 1972; and letter and attachment from John A. Buggs, Staff Director-designate, U.S. Commission on Civil Rights, to Mr. Norman, Jan. 12, 1972. See also, U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort--1974*, Vol. VI, ch. 1 (in preparation).

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[60] This Commission has commented on ORS' regulation. In addition to criticizing it for being weaker than the uniform Title VI regulations, this Commission noted such other deficiencies as: (a) the failure to require ORS to conclude, within 60 days following the effective date of the regulation, enforcement agreements with those Federal agencies having a substantial responsibility in the enforcement of Title VI to ensure that ORS makes full use of the potential capability of the agencies for effecting compliance with civil rights requirements in particular substantive areas such as housing, health, and social services; (b) the failure to require State and local governments to designate an agency to assist the Secretary of the Treasury in ensuring compliance with the civil rights provisions of the Act; and (c) the failure to require the appointment of an Assistant Director of ORS with the principal responsibility for ensuring that no racial, ethnic, or sex discrimination resulted from the administration of the Act. See letters from Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, to George P. Shultz, Secretary of the Treasury, Jan. 5, 1973, and letter from John A. Buggs, Staff Director, U.S. Commission on Civil Rights to Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, Mar. 20, 1973.

(1) A statement that the listing of specific discriminatory acts prohibited by the regulations is not exhaustive, but merely illustrative or suggestive;[61] such a provision would place recipients on notice that they must consider all discriminatory implications when handling or spending GRS funds.[62]

(2) A statement that the assurances required by the regulation, including an assurance of compliance with the nondiscrimination provision, shall be expressly subject to judicial enforcement by the Federal Government;[63] such a provision would have aided in putting recipients on notice that the assurances are not a mere formality;

(3) A requirement, for any real property acquired or improved with GRS funds, that there be a convenant running with the land, upon any subsequent transfer, to assure nondiscrimination, at least where, upon any

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[61] Such a statement is contained, for example, in Department of Health, Education, and Welfare (HEW) Title VI regulations, 45 C.F.R. § 80.3(b)(5); and Department of Housing and Urban Development (HUD) Title VI regulations, 24 C.F.R. § 1.4(b)(5)

[62] Five months after promulgation of the final regulation, the Director of ORS acknowledged that the regulation was not exhaustive. Commission staff notes from a hearing, "Civil Rights Aspects of General Revenue Sharing," Before the Subcommittee on Civil Rights and Constitutional Rights of the House Committee on the Judiciary, 93d Cong., 2d Sess. (Sept. 6, 1973) /hereinafter referred to as Civil Rights Hearings/. (As of November 26, 1974, these hearings had not been printed.) Nevertheless, ORS has not amended its regulation to reflect this view, although ORS has amended sections of its regulation other than the nondiscrimination section.

[63] E.g., 45 C.F.R. § 80.4(a)(1) (HEW); 24 C.F.R. § 1.5(a)(1) (HUD). Although the Director of ORS declared that the statement of assurances constitutes a "legal document," he did not state in what way or for what purpose it is so regarded. Civil Rights Hearings, supra note 62.

such transfer, the real property is to be used for the same purpose as, or one similar to, the purpose for which the GRS recipient acquired or improved the property;[64] such a provision would have made clear, for instance, that transferees of real property acquired or improved through the use of GRS funds would be subject to the nondiscrimination provisions of the Act with regard to the use of the property.

(4) A provision that specific discriminatory practices prohibited include denial of an equal opportunity for minorities or women to participate as members of planning or advisory bodies in connection with the disposition of GRS funds, at least where any such bodies are composed of appointed citizens;[65] this would have enhanced the ability of women and minority citizens to have effective input into spending decisions.

(5) A provision that the prohibition of discrimination in services extends to services made available in a facility provided in whole or in part with GRS funds;[66] a recipient reasoning narrowly in interpreting the nondiscrimination provision might conclude that so long as GRS funds were not used to provide services in such a facility, discrimination in services would not violate the Act.

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[64] Cf., e.g., 45 C.F.R. § 80.4(a)(1) and (2) (HEW); 24 C.F.R. § 1.5(a)(1) and (2) (HUD).

[65] E.g., 45 C.F.R. § 80.3(b)(1)(vii) (HEW); 24 C.F.R. § 1.4(b)(1)(vii) (HUD). ORS has since stated it has interpreted the nondiscrimination requirement "so that minorities have the right to sit on" citizen committees that have review authority over planning activities and proposed expenditures. Attachment to Parker letter, supra note 39.

[66] E.g., 45 C.F.R. § 80.3(b)(4) (HEW); 24 C.F.R. § 1.4(b)(4) (HUD).

(6) A provision that, where past unlawful discrimination has occurred, recipients must act affirmatively to overcome any present effects of such past discrimination;[67] this would have made clear that the vestiges of past discrimination must not be permitted to persist; ORS' regulations are merely permissive on this issue, not mandatory.[68]

(7) A provision that recipients must compile and maintain racial and ethnic data, by sex, in relation to programs and activities funded in whole or in part with GRS funds.[69] Such data might document the degree to which minorities and women number among those eligible to participate in and are actually participating in or otherwise deriving benefit from services or facilities in programs provided with GRS funds.

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[67] E.g., 45 C.F.R. § 80.3(b)(6)(i) (HEW); 24 C.F.R. § 1.4(b)(6)(i) (HUD).

[68] ORS provides that:

> A recipient government shall not be prohibited by this section from taking any action to ameliorate an imbalance in services or facilities provided to any geographic area or specific group or persons within its jurisdiction, where the purpose of such action is to overcome prior discriminatory practice or usage. 31 C.F.R. § 51.32(b)(4).

[69] Cf., e.g., 45 C.F.R. § 80.6(b) (HEW); 24 C.F.R. § 1.6(b) (HUD).

ORS' regulation is geared to the ORS belief that GRS recipients will readily comply with the requirements facing them. ORS stated that:

> The philosophy of the legislation, the philosophy of the ORS, and the reality of American Federalism all indicate that governments will comply with a law which they favor if they clearly know the nature of their responsibilities. [Emphasis in original.] 70

Clear statements of responsibilities are indeed a sound first step towards ensuring that responsibilities are met. A primary means by which Federal agencies make clear the responsibilities of recipients of Federal assistance is through the promulgation of administrative regulations.

ORS' regulation reflects the attitude that discrimination is something any responsible program official can "know" intuitively, and that, therefore, only minimal definition and guidance need be

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70. Attachment to Parker letter, supra note 39.

supplied by ORS.[71] This assumption appears to be unwarranted. The distant past aside,[72] contemporary history indicates that State and local government acts, procedures, and policies continue to reflect both intentional and unintentional discrimination against Asian Americans.

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[71] ORS' chief counsel stated that further guidance than the existing regulation is not necessary for implementation of the Act's nondiscrimination clause, asserting, for example, that jurisdictions which have previously received Federal assistance, i.e., all of the States and most larger cities in the country, will know what is required of them, and that the issuance of additional or more detailed regulations would only make compliance more burdensome for the recipients. Sager interview, supra note 40. It is the Commission's position, however, that additional regulations explaining what is necessary for compliance with the Act would not increase the burden on recipients. We concur with ORS when it stated:

> We do not believe that the coverage of the flat statutory prohibition against discrimination in the use of revenue sharing funds can be either expanded or contracted by administrative regulation. 1975 Watt letter, supra note 14.

[72] ORS has stated that:

> Much is made by the Civil Rights Commission of the fact that state and local governments have historically subjugated minorities. However, as noted in a speech to a National Urban League conference by Judge Samuel B. Pierce, formerly the highest ranking black man in the Treasury Department[,] 'putting money and responsiblity into the branch of State and local officials is a different proposition in 1973 than it was a decade or so ago. A plethora of Federal statutes and court decision[s] have struck down many of the practices which local leaders were able to avail themselves of in maintaining power and subjugating minorities.' Attachment to Parker letter, supra note 39.

blacks, Native Americans, persons of Spanish speaking background and women.[73] A review of recent litigation reveals, for example, that public schools are not yet desegregated;[74] national origin groups are denied equal educational opportunity through failure of school officials to take their language needs into account;[75] minorities are discriminated against in the provision of municipal services;[76] the actions of local government officials perpetuate discrimination in housing[77] and other areas;[78] reapportionment schemes threaten to dilute the minority vote;[79] minorities are prevented from the intelligent exercise of their right to vote through lack of assistance in a language they can understand;[80] and entrance requirements for public employment disproportionately excluded minorities.[81] Recent court cases also show discrimination against women in such areas as

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[73] After reviewing this report in draft form, ORS stated:

> We stand behind our assessment that most State and local recipient governments will make a good faith attempt to comply with the nondiscrimination regulations and most such governments have come a long way toward eliminating discriminatory practices. However, we have never indicated that discriminatory practices by recipient governments have already been totally eradicated. Accordingly, we feel that the several pages of legal citations in the draft report to discrimination cases (pages [31], _et seq._) serve no purpose and have no bearing on the civil rights enforcement program of the Office of Revenue Sharing, except perhaps to confuse the reader as to the real purpose of the report.
>
> It is incongruous to maintain that, since State and local governments will, as a rule, seek to circumvent their civil rights responsibilities, the voluminous and often redundant regulations suggested in the report are required. Those public officials who unfortunantely resist implementation of nondiscriminatory policies will not be led to change voluntarily their ways by the promulgation of additional explanatory regulations. The Department of Health, Education and Welfare can attest that their voluminous Title VI regulations did not serve to cause the City of Ferndale, Michigan, for example, to desegregate an elementary public school. 1975 Watt letter, _supra_ note 14.

Contrary to the impression created by ORS' comment, this report does not maintain that "State and local governments will, as a rule, seek to circumvent their civil rights responsibilities." Rather, the Commission maintains that State and local government activity reflects continual discrimination, which is in some instances intentional, but in other cases unintentional. The purpose of a more detailed regulation would be to provide sufficient information to recipients so that they would know what constitutes noncompliance with the civil rights provision of the Act and what steps are necessary to achieve compliance. For a further discussion of this point see p. 34-36 _infra_.

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[74] E.g., Milliken v. Bradley [Detroit], 94 S. Ct. 3112 (1974); Morgan v. Hennigan [Boston], 379 F. Supp. 410 (D. Mass. 1974); United States v. Bd. of School Comm'rs [Indianapolis], 474 F.2d 81 (7th Cir. 1973), *cert. denied* 413 U.S. 920 (1973); Keyes v. School District No. 1 [Denver], 413 U.S. 189 (1973), *on remand*, 368 F. Supp. 207 (D. Col. 1973), *clarified* in 380 F. Supp. 673 (1974).

[75] Lau v. Nichols, 414 U.S. 563 (1974), [failure of city school system to provide English language instruction to students of Chinese ancestry who do not speak English or to provide them with other adequate instructional procedures violates Title VI and HEW implementing regulations]; Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974) [*accord*, as to Mexican American school children].

[76] E.g., Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), aff'd on reh. en banc 461 F.2d 1171 (5th Cir. 1972) [order entered requiring city to develop plan for provision of municipal services in minority neighborhoods equal to those provided in nonminority neighborhoods]; Fire v. City of Winner, 352 F. Supp. 925 (D.S.D. 1972) [filing of suit by Native Americans prompted initiation of improvements in some services]; Harris v. Town of Itta Bena, Civ. No. GC67-56-S (N.D. Miss. 1973) [consent decree entered requiring approximately $500,000 in improvements in minority community].

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[77] *E.g.*, United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida, 493 F.2d 799 (5th Cir. 1974) [city's refusal to permit minority-sponsored housing project to tie into city water and sewer lines was racially discriminatory and in violation of the Equal Protection Clause (city had made significant exceptions from its zoning and annexation laws for whites, but refused to do so for blacks); city failed to sustain its burden of demonstrating that its refusal, and resulting discrimination, were necessary to promote a compelling governmental interest]; Taylor v. City of Millington [Tenn.], 476 F.2d 599 (6th Cir. 1973) [aff'd per curiam a judgment that city housing authority's policies operated to separate the races in public housing projects and were in violation of the Civil Rights Act of 1964]; Joseph Skillken and Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974) [city's disapproval of three sites for public housing projects in predominantly white areas of city was racially motivated and violated the Civil Rights Act of 1866 and the Fair Housing Act; city was unable to show a compelling interest to support the discrimination: thus city's order rejecting the sites was void and unenforceable]; Morales v. Haines, P-H Equal Opportunity in Housing para 3, 677 (N.D. Ill. 1974) [city council's resolution not to issue any more permits for construction of housing under § 235 of the National Housing Act (12 U.S.C. § 1715z) was racially motivated and in violation of the Civil Rights Act of 1866 and the Fair Housing Act]; Kennedy Park Homes Ass'n v. City of Lackawanna, New York, 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd* 436 F.2d 108 (2d Cir. 1970), *cert. denied* 401 U.S. 1010 (1971) [actions of city officials included adoption of a moratorium on new housing subdivisions and zoning, as open space and park area, land which had earlier been proposed as a site for a low-income housing project--these actions were racially discriminatory and unlawful].

[78] Gilmore v. City of Montgomery [Alabama], 94 S.Ct. 2416 (1974), *aff'd in part, rev'g in part, and remanding* 473 F.2d 832 (5th Cir. 1973), which *modified* 337 F. Supp. 22 (M.D. Ala. 1972) [Court affirmed that part of an injunction that prohibited the city from granting exclusive access over public recreational facilities to private segregated schools] [case was only latest chapter in 15-year history of litigation over racial segregation in Montgomery's parks]; United States v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969) [ordinance prohibiting operators of bars and cocktail lounges from admitting any military personnel in uniforms was enacted for purposes of aiding racial discrimination by frustrating efforts of military authorities to bring about desegregation in communities adjoining military installations, and was unconstitutional].

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[79] White v. Regester, 412 U.S. 755, (1973), *aff'g in part and rev'g in part* Graves v. Barnes 343 F. Supp. 7045 (W.D. Tex. 1972) (three-judge court) [Court was unanimous in affirming district court's invalidation of the multimember district in Dallas County, Texas, as having unconstitutionally diluted the vote of blacks, and in Bexar County, Texas, as having unconstitutionally diluted the vote of Mexican Americans]; Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *rev'g* 467 F.2d 1381 (5th Cir. 1972) [at large elections in Louisiana county with history of racial discrimination, in which blacks constituted only 46 percent of registered voters, although they comprised 59 percent of the total population, unconstitutionally diluted black voting strength (citing White v. Regester, *supra* this note)].

[80] Puerto Rican Org. for Pol. Action v. Kusper, 490 F.2d 575 (7th Cir. 1973) [affirmed propriety of preliminary injunction issued by district court to protect rights of plaintiffs in 1972 general election by requiring election commissioners to provide voting assistance in Spanish language]; Coalition for Educ. in Dist. One v. Bd. of Elections of City of New York, 370 F. Supp. 42 (S.D. N.Y. 1974), *aff'd* 495 F.2d 1090 (2n Cir. 1974) [actions of city Board of Education and Board of Elections resulted in discrimination against black, Chinese, and Puerto Rican voters during school election; election declared invalid and new election ordered].

[81] Morrow v. Crisler, 479 F.2d 960 (5th Cir. 1973), *aff'd and remanded en banc* 491 F.2d 1053 (1974) [affirmed district court finding of discrimination against blacks in employment of Mississippi Highway Safety Patrol]; Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *aff'd on reh. en banc*, 452 F.2d 327 (1972), *cert. denied* 406 U.S. 950 (1972) [affirmed findings of discrimination in Minneapolis fire department and affirmed injunction against use of arrest and conviction records and high school diploma or equivalency requirement for employment]; Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973) [use of Army-developed screening test for employment with police department discriminatory against blacks; preliminary injunction granted]; Chance v. Bd. of Examiners, 330 F. Supp. 203, *aff'd* 458 F.2d 1167 (2d Cir. 1972) [issuance of preliminary injunction warranted in suit to enjoin use of State examinations for candidates seeking licenses for permanent appointments to supervisory positions in school systems. [Defendants were unable to show an overriding justification for using the examinations when evidence showed that such use had the effect of discrimination against minority applicants.]

public employment, administration of estates, education, voting, and unemployment compensation.[82]

Even where recipient governments are willing to comply with the Act's prohibition of discrimination, they may fail to do so for lack of understanding that certain arrangements or practices may inadvertently have the effect of freezing victims of past discrimination into a discriminatory status quo.[83] Such a view was recently put forth by the Assistant Attorney General for Civil Rights who stated:

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82. E.g., Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), aff'g 465 F.2d 1184 (6th Cir. 1972) [mandatory termination and other provisions for maternity leave of public school teachers violative of Due Process clause of 14th Amendment; Supreme Court did not reach Equal Protection issue]; Reed v. Reed, 404 U.S. 71 (1971) [Idaho statute mandating, as between persons equally qualified to administer estates, preference for men over women, violates the Equal Protection clause of the 14 Amendment]; Berkelman v. San Francisco Unified School District 501 F.2d 1264 (9th Cir. 1974) [school district requirement that, for admission to a college-preparatory high school, females be held to a higher academic admission standard than males violated the equal protection clause of the 14th Amendment]; Kane v. Fortson, 369 F. Supp. 1342 (N.D. Ga. 1973) (three-judge court) [consent order: joint operation of certain provisions of Georgia Code, insofar as such operation establishes an irrebuttable presumption that the domicile and residence of a married woman is that of her husband, and thereby prevents her from registering to vote in Georgia, violates the 19th Amendment of the Constitution]; Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973) [use of minimum height and weight requirements for police department employment unlawfully discriminates against women]; Vick v. Texas Employment Commission, FEP Cas. 411 (S.D. Tex. 1973) [State employment agency of Texas violated Title VII's ban on sex discrimination when, pursuant to its policy of denying unemployment compensation benefits to applicants in their last trimester of pregnancy, it denied them to plaintiff]; Kirstein v. Rector and Vistors of Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) [denial to women, on basis of sex, of their constitutional right to education equal with that offered men, violated equal protection clause of 14th Amendment].

83. It has been held that under certain circumstances, questions of present intent become irrelevant to the inquiry whether a civil rights law has been violated. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment); Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) aff'd on reh. en banc 461 F.2d 1171 (5th Cir. 1972) (per curiam) (provision of municipal services). Indeed, ORS regulations proscribe not only overt, i.e., intentional, discrimination, but criteria or methods of administration which have the effect of discriminating. See 31 C.F.R. § 51.32(b)(2) (1974).

> Discriminatory intent, administrative sloth, and power politics, however, are not the sole, nor, perhaps, the major cause of discrimination. Discrimination can arise without an intent to discriminate, and frequently arises merely because the recipient does not know how not to discriminate. The federal agency, therefore, must provide recipients with clear and intelligible guidelines, and train the recipients intensively in how to apply them. Only when state and local agencies know what is expected of them, when they have a thorough understanding of what the federal laws and Constitution require, can they carry out their proper role in the federal system. [84]

Lack of understanding may be especially prevalent among ORS' smaller recipients. More than half of the 39,000 recipients of GRS number 1,000 or fewer in population,[85] and 80 percent of all GRS recipients have populations[86] of 2,500 or less. It stands to reason that many of these smaller recipients in particular may be lacking in civil rights expertise,[87] because they may have had little or no previous Federal program experience and thus lack a functional knowledge of Title VI of the Civil Rights Act of 1964, which prohibits discrimination in access to and provision of federally-funded services.

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[84] Speech by J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, before Department of Transportation Regional Civil Rights Officials, "Managing Title VI Programs," Nov. 8, 1974.

[85] As of early 1972, there were 9,664 municipalities and 10,246 townships in the United States with a population of 1,000 or less. U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of the Census, 1972 Census of Governments, Vol. I (Governmental Organization) at 2-3.

[86] Statement of Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, in Hearings on Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1975 Before the Subcomm. on the Treasury, Postal Service, and General Government Appropriations of the House Comm. on Appropriations, 93d Cong., 2d Sess., pt. 1 at 288 (1974) [hereinafter referred to as Appropriations Hearings].

[87] A number of recipients proved themselves unable early in the course of experience under the Act to comply with even the simplest requirement--the filing of annual reports on the actual uses of GRS funds. More than 5,000 recipients failed to meet their September 1, 1973, deadline--the due date for the first actual use reports. See Revenue Sharing Advisory Service, 2 Revenue Sharing Bulletin No. 6, at 1 (March 1974). For the relationship of this requirement to civil rights, see Section IV A, infra. More recently, several thousand recipients failed to submit planned use reports on time for the fifth entitlement period. Office of Revenue Sharing, Department of the Treasury, 2 Revenews No. 3 at 6 (July 1974).

Moreover, GRS funds are available for spending in a spectrum of programs broader than those previously provided for under Federal assistance programs subject to Title VI; thus the prohibition of discrimination under GRS extends to areas, such as fire prevention services, in which even those recipients familiar with Title VI will have had little or no direct experience with Federal civil rights compliance requirements and standards. Finally, in one respect, experience under Title VI may not prove an entirely reliable guide for any recipient, since Title VI does not cover sex discrimination and does not fully cover employment discrimination. The State and Local Fiscal Assistance Act does.

Despite these considerations, ORS has done little by way of regulations to make clear the nature of recipients' civil rights responsibilities.

For example, the CRS regulations fail to provide any meaningful guidance in the area of sex discrimination.[88] Although, as of mid-1973, the Director of ORS acknowledged that additional regulations on sex discrimination might be needed at some unspecified future time,[89] none had been promulgated as of November 1974.

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[88] ORS' regulation's only substantive treatment of sex discrimination provides:

> Notwithstanding anything to the contrary in this section, nothing contained herein shall be construed to prohibit any recipient government from maintaining or constructing separate living facilities or restroom facilities for the different sexes. Furthermore, selectivity on the basis of sex is not prohibited when institutional or custodial services can properly be performed only by a member of the same sex as the recipients of the services. 31 C.F.R. § 51.32(b)(5).

This provision is apparently the extent of ORS' response to a March 1973 request of women's rights groups for amplification. See letter from Ann Scott, Vice President for Legislation, National Organization for Women, to James N. Purcell, Jr., Chairman, General Revenue Sharing Working Group, Office of Management and Budget, Sept. 27, 1974.

Similarly, ORS' regulation provides almost no guidance in the area of equal opportunity in employment. Perhaps its failure to provide for guidelines in both the areas of sex discrimination and employment stem from the viewpoint expressed in the following ORS statement:

> The Office of Revenue Sharing is of the opinion that sufficient guidelines already exist with respect to sex discrimination and employment. The draft report points out these guidelines... [on p. 39 infra].[90]

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[89] Civil Rights Hearings, supra note 62. Guidance is necessary on such issues as funding or other support or assistance to sports programs which exclude women, or which do not permit their participation on an equal basis with men; sponsorship or assistance to trade or business associations which exclude women; failure of a GRS-funded clinic to provide male as well as female birth control information and devices; disparate as compared to male prisoners, or the provision to women in prison of sex-stereotyped training only, e.g., secretarial or sewing classes; or the failure to provide an appropriate number of places for women in half-way houses of a quality comparable to those provided to men.

[90] Attachment 2 to 1975 Watt letter, supra note 14.

Indeed, the Office of Federal Contract Compliance (OFCC) of the Department of Labor has issued a regulation, called Revised Order No. 4, which sets forth specific elements of an affirmative action plan which Federal nonconstruction contractors must establish, and the Equal Employment Opportunity Commission (EEOC) has issued similar guidelines which are recommended for all private employers covered by Title VII of the Civil Rights Act of 1964.[91] Similarly, the EEOC and OFCC have published guidelines on sex discrimination in employment and on employee testing procedures.[92] On the whole, the most comprehensive standards are those set by the guidelines and decisions of EEOC.[93] ORS has not, however, adopted these standards as its own by incorporation into its own regulation. Until it does so, its recipients will not be on formal notification that to be in compliance with the ORS nondiscrimination provision they must be in compliance with EEOC standards.

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[91] Office of Federal Contract Compliance, Revised Order No. 4, 41 C.F.R. § 60-2, and Equal Employment Opportunity Commission, Affirmative Action and Equal Employment: A Guidebook for Employers (1973).

[92] EEOC's sex discrimination guidelines are published at 29 C.F.R. § 1604, and OFCC's at 41 C.F.R. § 60-20. EEOC's testing guidelines are published at 29 C.F.R. § 1607, and OFCC's at 41 C.F.R. § 60-3.

[93] See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, Employment (in preparation).

As ORS' regulation stood in late 1974, the only specific reference to employment it contained was that a recipient government may not on the basis of race, sex, or national origin, "deny an opportunity to participate" as an employee in any program or activity to which the regulations apply.[94] Unlike Federal agency Title VI regulations, it did not even include an express statement that the coverage of employment practices includes recruitment or advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities.[95] The regulation did not include a requirement that each recipient develop and implement a written affirmative action plan to ensure that all new hires are selected and all employees are treated without discrimination on the basis of race, sex, or national origin.[96]

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[94] 31 C.F.R. § 51.32(b)(1)(vi).

[95] For examples of Title VI regulations, see 45 C.F.R. § 80.3(c)(1) (HEW); 24 C.F.R. § 1.4(c)(1) (HUD).

[96] This Commission recommended that such plans be required and that ORS set guidelines for the drafting of these plans. Buggs letter, *supra* note 60.

Finally, an ideal civil rights enforcement program would include established and published time limits for the accomplishment of specific stages of enforcement activity. Thus, for example, ORS might provide time limits for the following: determining whether a complaint received indicated possible noncompliance; scheduling an audit and investigation; completing the audit and investigation and writing findings and recommendations; advising the recipient involved of the results of the audit and investigation; completing negotiations with the recipient; monitoring periodically and reviewing reports regarding recipient implementation of compliance agreements; or, if voluntary compliance is not achieved, choosing what enforcement course to pursue; and scheduling and completing administrative hearings. If the Secretary of the Treasury made such time limits mandatory for ORS, and if such deadlines were incorporated in ORS' regulation and publicized to the recipients, recipients would be given clearly to understand that there will be little room for requests for delays or for protracting negotiations.[97]

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[97] See, in this regard, the recommendations of this Commission for time limits to be set by the Office for Civil Rights of the Department of Health, Education, and Welfare in enforcing civil rights in elementary and secondary and in higher education. U.S. Commission on Civil Rights, The Federal Civil rights Enforcement Effort--1974, Vol. III, To Ensure Equal Educational Opportunity, 380, 385-86, and 392 (January 1975).

In November 1974, ORS published a 21-page booklet, General Revenue Sharing and Civil Rights, which provides assistance to recipients and to the public on the meaning and application of the Act's prohibition of discrimination. Parts of this booklet are somewhat responsive to the omissions in ORS' regulation noted in this report.[98] It should also be mentioned, however, that compliance with the booklet, unlike the regulations, is not mandatory, and the language used is often suggestive rather than directive. It is thus not legally a substitute for regulations.[99]

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[98] Thus, for example, one paragraph addressed to recipients reads:

> In purchasing land for constructing public facilities with revenue sharing funds, determine beforehand if...facilities will provide services to all members of the community. If the facility is leased to a private organization at a later date, specify in the lease agreement that it shall not be used in a discriminatory manner. General Revenue Sharing and Civil Rights, supra note 40 at 14.

Another paragraph provides:

> Establish committees or advisory boards to collect input from members of the community and appoint minorities and women to these-- and other-committees or boards. Id.

[99] ORS stated:

> ...formal regulations are only one means of informing the public of the prohibition against the discriminatory use of revenue sharing funds. Publication of the booklet, General Revenue Sharing and Civil Rights by ORS has at least two principal advantages over increased regulations, viz., the booklet will have wider distribution than the Code of Federal Regulations; and it can be addressed and used by public officials and private citizens who appreciate reading information written in a familiar style. 1975 Watt letter, supra note 14.

The Commission notes, however, that regulations can and should be clearly written and that once regulations have been published in the Federal Register the agency promulgating them can distribute them as widely as it chooses. Moreover, regulations provide formal notification to recipients as to what is required of them.

Compliance Program

A. Assurances

ORS requires, as part of its compliance program, that all recipients sign assurances of compliance with the nondiscrimination section of the Act,[100] and with certain other provisions of the Act as well.[101] These assurances, which appear on the planned and actual use reports,[102] are to be signed by the chief executive office of each recipient in advance and at the close of each entitlement period. ORS has refused to provide funds to jurisdictions which have failed to file the planned and actual use reports, thus eliminating aid to jurisdictions which for one reason or another may prefer not to comply with the Act's requirements.

ORS attaches great importance to these assurances. The Director stated:

> It is our view that a false assurance is a violation of 18 U.S.C. 1001, a criminal statute of the United States Code.. In fact, that statutory section was reprinted in full on the first assurance form used by the Office of Revenue Sharing. 103

The assurances are, nonetheless, a superficial aspect of ORS' compliance program. The assurances consist merely of a form statement that there will be compliance with the stated provisions of the Act. Experience with other Federal programs has shown that most recipients of Federal assistance willingly sign assurances. False assurances under any Federal program are a violation

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100. 31 C.F.R. § 51.32(c). The recipient government must assure ORS that it will not exclude from participation in, deny the benefits of, or subject to discrimination, under any program or activity funded in whole or in part with revenue sharing funds, any persons in the United States on the ground of race, color, national origin, or sex.

101. These provisions are essentially those listed on pp. 4-5 supra.

102. These reports are discussed briefly on p. 4 supra.

103. Attachment 2 to 1975 Watt letter, supra note 14.

of 18 U.S.C. § 1001, but discrimination continues anyway.[104]

It is not clear that mere paper assurances were the intent of Congress. In the first place, the Act requires that all recipients "must establish...to the satisifaction of the Secretary"[105] that they will comply with the Act. Arguably, Congress meant that the recipients were to submit something more than mere paper assurances. Unless, recipients submit facts to ORS concerning their compliance status there is little way that they can demonstrate that they will comply with the Act. For example, they might be required to describe the methods of administration intended to be used to ensure compliance[106] or to describe any anticipated problems in ensuring compliance and the plans for meeting those problems. In the second place, the Act requires that assurances from a local unit of government must be submitted only "after an opportunity for review and comment"[107] by the Governor of the State in which the unit is located. It would arguably be a hollow exercise of review and comment by Governors if all they had before them were a set of signed form assurances.

B. Compliance Visits

While in the process of launching its compliance program, in May and June 1973, ORS visited the 103 approximately largest recipient jurisdictions, including most States.[108] The 103 units of government received 52 percent of all entitlement funds distributed through the third check payment.[109] This was ORS' first major compliance-related effort. It was a one-time project, not to be repeated. Among the purposes of the visits were:

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[104] The inadequacy of assurances as a basis for a compliance program is discussed in U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort, 213-214 (1971).

[105] 31 U.S.C. § 1243(a) (Supp. III, 1973).

[106] Such methods of administration are required by HEW. See 45 C.F.R. § 80.4(b).

[107] 31 U.S.C. § 1243(a) (Supp. III, 1973).

> to make a preliminary survey of financial operations: to begin the development of a compliance system with the assistance of state and local officials; and to discuss revenue sharing generally with the state and local officers having responsibility for administering the program.[110]

In addition, the visits were to assist ORS in determining its staffing requirements,[111] to assess State and local officials' understanding of the resources available to them for ensuring compliance with the civil rights requirements of the Act,[112] and to establish friendly relations with recipient jurisdictions.

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108. Delaware, Nevada, New Hampshire, Vermont, and Wyoming were not among the 100 largest recipients. They were visited, however, so that all of the contiguous United States would be surveyed. Alaska and Hawaii were not reviewed, because of the transportation costs which would have been involved. In addition to the 48 contiguous States, ORS visited 31 large cities, 23 major urban counties, and the District of Columbia. Fresno, California, Columbus, Ohio, and Norfolk, Virginia, the 96th, 97th, and 98th largest recipients, respectively, were not visited.

109. Office of Revenue Sharing, Department of the Treasury, General Revenue Sharing: Compliance by the States and Large Urban Jurisdictions--Initial Report at iv (October 1973) /hereinafter referred to as Compliance Report/. Through April 7, 1973, the 103 jurisdictions received almost $3.5 billion of a total of more than $6.5 billion disbursed to all jurisdictions.

110. Id.

111. Letter from Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, to Stephen Horn, Vice-Chairman, U.S. Commission on Civil Rights, June 1, 1973.

112. In visiting State and local officials, ORS staff members sought to assess those officials' understanding of the jurisdictions' capability of enforcing the civil rights requirements of the general revenue sharing law. Compliance Report, supra note 109, at 18. See also id. at viii and 21.

Each visit lasted from one-half day to a full day and was conducted by an auditor and a person with program experience.[113] Three or four interviews were conducted with each recipient government reviewed. A "compliance checklist" used for the survey[114] included 14 general information questions, 14 questions on uses of revenue sharing funds, 17 questions on accounting methods, and eight civil rights inquiries.[115] Despite ORS' representation that the visits could measure compliance with the Act,[116] the questions asked related only to recipients' means of assuring compliance and not to whether they were in compliance.

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[113] Eight professionals from the Departments of Agriculture, Commerce, Housing and Urban Development, and Health, Education and Welfare, as well as from the Bureau of Customs of the Department of the Treasury, assisted two ORS staff members in making these visits. The reviewers were generally GS-12's and 13's.

[114] Office of Revenue Sharing, Department of the Treasury, "Office of Revenue Sharing Compliance Checklist" (revised), May 25, 1973.

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115. The civil rights inquiries were:

(a) Whether there existed a State civil rights agency responsible for civil rights enforcement throughout the State (and if so, its name and the title, name, address, and telephone number of a responsible official).

(b) Whether the recipient unit of government had an office responsible for civil rights enforcement within itself (and if so, its name and the title, address, and telephone number of the official in charge).

(c) Whether contracts let by the unit of government contained a clause requiring nondiscrimination by subcontractors.

(d) Whether the unit government had a breakdown of population by minority group (specific groups mentioned by ORS were: "Black, Oriental, Spanish Surname, American Indian").

(e) Whether the unit of government had a breakdown of employees by minority group and grade in programs funded with revenue sharing monies and, if not, what measures were being taken to secure such a breakdown.

(f) What recruitment method (e.g., civil service, merit system, patronage) was used for selecting employees for programs funded with revenue sharing monies.

(g) Whether a general entrance test for employment applicants was used by the unit of government, and if so, whether it had been "validated for nondiscrimination," and, if so, how.

(h) Whether the Federal Government or any local antidiscrimination agency had determined that any complaint filed against any program supported by revenue sharing funds has a valid basis, and if so, the name and address of the agency and the status of the complaint.

In addition, Section VII of the checklist, "Documents Requested," sought copies of (among others) the recipients' standard form contracts or any part thereof dealing with nondiscrimination, a breakdown by level of employment of minority employees "working in the various programs funded or administered by your government," and copies of local civil rights laws, regulations, and policies.

116. ORS' summary of its work in this period purports on its face to be an "initial report" on "compliance by the States and large urban jurisdictions." *Compliance Report*, *supra* note 109. One of the stated purposes of the effort was "to ascertain how the units of government were complying with the provisions of the State and Local Fiscal Assistance Act." *Id*. at iv. The Director of ORS has testified to a subcommittee of the Congress that ORS had "been able to make a very find compliance review in each of these 103 jurisidictions." *Civil Rights Hearings*, *supra* note 62.

Even so, the civil rights questions asked seemed deficient. For example, visiting teams were not directed by the checklist to seek from recipient officials their own description and characterization of pertinent State and local civil rights laws, despite the representation that reviewers sought to assess those officials' understanding of their jurisdiction's capability of enforcing the civil rights requirements of the Act.[117] In addition, some of the questions were imprecise. For example, the question regarding nondiscrimination clauses in contracts related only to subcontractors, but not prime contractors. Similarly, the question concerning the filing of complaints[118] inquired about complaints filed with Federal and local antidiscrimination agencies, but not with State agencies. Moreover, it was limited to complaints filed against programs in which revenue sharing funds were being used. Thus, the question did not include outstanding compliance problems in programs other than revenue sharing, e.g., Title VI programs, or programs funded entirely with State or local government money. Further, the question was limited to complaints determined to have a valid basis. ORS responded to this Commission's criticism of the civil rights questions:

> By stating...that the Title VI programs were not reviewed by ORS for civil rights compliance, the draft report infers that they should have been. At the time of the ORS Compliance reviews, more than 4,500 complaints had been filed against public employers. Thus, the magnitude of the survey can be readily seen. ORS' concern was necessarily limited to "valid" complaints. Accordingly, while the draft report recognizes the limited purpose of the ORS Compliance reviews, it criticizes ORS for its failure to conduct indepth reviews. 119

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117. *Id*.

118. See question (h), *supra* note 115.

119. Attachment 2 to 1975 Watt letter, *supra* note 14.

This Commission notes, however, that the fact that ORS may have a great number of indications of noncompliance by many State and local governments does not relieve it from the responsibility of searching for further instances. To the extent that there are unresolved compliance problems in any of the recipients' non-GRS-funded programs, this might serve as an indicator to ORS that an indepth review of revenue sharing-funded programs is warranted. Moreover, a listing of the troublesome non-GRS-funded areas could be used to trigger a civil rights review if a receipient government, at a later date, decided to allocate GRS funds to one or more of these areas. Moreover, the question should not be limited to those having a valid[120] basis, for two reasons: (1) there may be numerous complaints filed and pending investigation or otherwise short of a determination of validity, which demonstrate a prima facie violation of the Act's civil rights provision; and (2) whether or not the State or local government's determination of validity can be accepted, sheer volume of complaints may be a factor warranting further consideration.

Another area of inadequate treatment involved data collection. Although the survey sought to determine whether recipients maintain racial-ethnic data on both population and government employment, information as to whether a breakdown by sex and/or separate data on sex were maintained was not solicited, despite the inclusion of sex within the Act's prohibition.[121] Moreover, no data were solicited on the race, ethnic origin, or sex of participants in revenue sharing-funded programs.

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[120] ORS did not indicate whether its teams were to rely on State and local government determinations of validity or whether the teams were to exercise their own judgment.

[121] See also, section IV F infra, Data Collection.

ORS summary of these visits, the Compliance Report, indicates possible unresolved noncompliance with the civil rights provisions of the Act, but it does not provide sufficient evidence of the extent, nature, or status of such problems to be enlightening. For example, in the course of the compliance visits, ORS found that only about two-fifths of the States and two-fifths of the local governments had validated or were in the process of validating their entrance employment tests.[122] The Compliance Report, however, did not state how many of the other recipients visited used tests as an aid in employee selection, nor, of that number, how many had determined that their tests impacted disproportionately on minority applicants or women. Any enlightened government using tests and acting in good faith would have moved to determine whether its tests have a disproportionate impact, and if the tests did have such an effect, would have proceeded to examine the validity of the tests.[123] The Compliance Report also stated that there may be some misunderstanding among recipient officials regarding the scope of State and local civil rights agencies and laws in relation to revenue sharing.[124]

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[122] Compliance Report, supra note 109, at 20. The U.S. Supreme Court several years ago indicated the appropriateness of test validation wherever employment tests operate to disqualify disproportionately more minority than nonminority job applicants. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The rationale of the decision extends to sex as well as race and ethnic discrimination.

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123. EEOC guidelines, effective on August 1, 1970, state:

> The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility...and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use. 29 C.F.R. § 1607.3.

As of November 1974 these guidelines were in the process of being strengthened. See, U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V, Employment, chs. 1 and 4 (in preparation), for a further discussion of guidelines for employee selection.

124. ORS stated that:

> ...a number of officials responsible for the revenue sharing program are not fully aware of civil rights enforcement organizations able to assist in ensuring nondiscriminatory use of revenue sharing funds. Compliance Report, supra note 109, at viii.

Indeed, ORS found that one State chief budget officer was completely unaware of the existence of his State's civil rights agency. Interview with Robert T. Murphy, Compliance Manager, and Malaku J. Steen, Civil Rights Specialist, Compliance Division, Office of Revenue Sharing, Department of the Treasury, Sept. 21, 1973.

Despite the lack of specificity in the Compliance Report, it is clear that a few civil rights compliance problems were uncovered. The Director of ORS stated that of the 103 places visited, 46 cases (45 percent) "required more extensive factfinding or corrective action."[125] About 10 of these were civil rights problems.[126]

Resolution of the compliance problems appears to have been slow. Shortly after the visits, ORS stated that it was merely "keeping an eye" on the civil rights problems.[127] In late spring 1974, almost one year after the visits, the Director of ORS stated that of the 46 places requiring further action, resolution had been achieved in nine places and that the remaining 37 were "being resolved as rapidly as resources permit."[128]

C. Audits

The State and Local Fiscal Assistance Act of 1972 makes express provision for auditing as a means of ensuring compliance with the requirements of the Act.[129] The audits are to embrace not only primary recipients, i.e., the units of government but secondary recipients as well, e.g., contractors, subcontractors, and subgrantees.[130]

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[125] Appropriations Hearings, supra note 86, at 305-06.

[126] September 1973 Murphy interview, supra note 124.

[127] Id.

[128] Appropriations Hearings, supra note 86, at 305-06.

[129] 31 U.S.C. § 1243(c)(1) (Supp. III, 1973).

Auditing is to be a principal tool for ensuring compliance with the Act. In the fall of 1973 Director Watt described ORS' plans for compliance:

> We intend to seek to achieve comprehensive compliance with all of the requirements and restrictions of the Revenue Sharing Act in a new and innovative manner. Rather than create a large, bureaucratic organization of auditors, investigators, analysts and other federal employees, we propose to construct and manage a comprehensive compliance *system* which relies upon a variety of existing audit resources, augmented as necessary by ORS staff, all managed, administered and coordinated by the ORS to accomplish our legal responsibilities most effectively. [Emphasis in original.] [131]

The Secretary's regulations make clear that auditing will include civil rights compliance.[132] Nonetheless, ORS' *Audit Guide and Standards for Revenue Sharing Recipients*, which set forth the standards for auditing the expenditures of GRS funds by recipients, contains only a modest section devoted to auditing civil rights compliance. ORS, however, has stated:

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[130] Office of Revenue Sharing, Department of the Treasury, *Audit Guide and Standards for Revenue Sharing Recipients* (October 1973) [hereinafter referred to as the *Audit Guide*]. For Commission staff comments on the *Audit Guide*, see letter from Jeffrey M. Miller, Director, Office of Federal Civil Rights Evaluation, U.S. Commission on Civil Rights, to Robert T. Murphy, Compliance Manager, Office of Revenue Sharing, Department of the Treasury, July 20, 1973; and letter from Mr. Miller to Dr. Murphy (enclosing comments on a revised draft of the *Audit Guide*), Sept. 26, 1973.

[131] Statement by Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary, Sept. 6, 1973 (text provided by ORS at 7-8).

[132] 31 C.F.R. § 51.41(c)(2). Auditing must also include such matters as review of GRS entitlement fund transactions and examination of the accuracy of fiscal data and public records. *Id.*

> The "modest section devoted to auditing civil rights compliance" contained in ORS's Audit Guide and Standards for Revenue Sharing Recipients ... is far more extensive than similar provisions contained in any other financial audit guide that we are aware of. 133

It is important to note that there is no other major Federal assistance program where financial audit procedure is used as a primary tool for monitoring civil rights compliance. Thus, it would appear that the Audit Guide would have to contain a more extensive civil rights section than other financial audit guides if it is to accomplish any civil rights review at all.

It is apparent that ORS does not intend the civil rights component of the audits to serve as comprehensive civil rights compliance reviews. Director Watt has stated that the Audit Guide includes only as many civil rights matters as can be covered by financial auditors. ORS has stated that it will not depend on the auditing system for civil rights compliance review and that the

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133. Audit Guide, supra note 130. ORS stated:

> The discussion in the draft report on pages (53-57) criticizing ORS's Audit Guide and Standards for Revenue Sharing Recipients needs amplification. Apparently, your criticism is directed to the fact that the Audit Guide contains only a modest section on civil rights compliance. Our operational experience shows that the main areas of noncompliance in discrimination reported to us are the areas of employment and services rendered. The ORS Audit Guide contains audit steps to cover both of those areas. For example, the auditor must do some analysis on facilities which analysis ties into the service area. The auditor must also ascertain that EEOC reports are filed. EEOC is required to analyze the data and coordinate with ORS in problem areas involving General Revenue Sharing funds. Attachment 2 to 1975 Watt letter, supra note 14.

There are, however, only 7 limited civil rights questions. Only one of these clearly related to services. See note 134 infra.

Audit Guide is just an attempt to make the existing financial audit systems "cough up" civil rights information.

Indeed, although the civil rights section of the Audit Guide contains seven questions,[134] these questions are limited. For example, only current complaints filed with State and local agencies are inquired into; recipients' knowledge of complaints filed with Federal agencies is not sought, and earlier complaints, e.g., those closed or withdrawn, are not included in the question. Moreover, although the nature and status of complaints are sought, the Audit Guide does not require a statement of the nature and status of any lawsuits. Finally, although auditors are directed to determine whether a formal policy of nondiscrimination in employment has been established by recipients or whether any affirmative action plans have been developed, auditors are not directed to secure copies of these documents.

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[134] The seven inquiries are:

(a) Whether recipients have kept records and filed reports required by the Equal Employment Opportunity Commission (EEOC).

(b) Whether there is a State and/or local agency responsible for ensuring civil rights compliance by the recipient; if so, whether there are any current complaints filed with or investigations in progress involving revenue sharing funds; and the nature and status of any investigation which may exist.

(c) Whether the recipient has an office responsible for civil rights enforcement internally; if so, whether there are any current complaints filed with or investigations in progress by such office involving revenue sharing funds; and the nature and status of such complaints or investigations.

(d) Whether any civil rights suits have been adjudicated or are pending against a recipient involving revenue sharing funds.

(e) Whether the recipient is required to develop an affirmative action plan and, if so, whether this has been done.

(f) Whether any facilities financed by revenue sharing funds have been located in such a manner as to obviously have the effect of discriminating.

(g) Whether the recipient has established a formal policy concerning nondiscrimination in employment.

The Audit Guide is inadequate for any systematic determination of possible noncompliance.[135] Auditors are not directed to collect or review racial and ethnic data by sex of employees of the eligible and actual beneficiary population for programs and activities funded with GRS funds. Aside from the specific coverage of siting of facilities, which is itself limited only to instances where siting is "obviously"[136] discriminatory in effect, no specific inquiry designed to determine actual compliance is directed.

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[135] Id. at V-4.

[136] The Director of the Revenue Sharing Project of the Center for National Policy Review stated that ORS does not provide auditors with adequate standards or guidance for civil rights reviews of recipients. Mr. Sklar also observed that there is no established method for dealing with cases of possible noncompliance uncovered by auditors. He stated, "As the situation stands, too much is left to the discretion of untrained and unguided local officials." Telephone interview with Morton H. Sklar, Revenue Sharing Project Director, Center for National Policy Review, Dec. 23, 1974.

Auditors are instructed to include in their audit reports any findings which indicate a possible discriminatory action, but the Audit Guide provides little help for identifying such actions.[137] Moreover, ORS permits the recipients' chief executive officers, where audits disclose no instance of possible noncompliance, the option of either forwarding to ORS a copy of the audit report or signing and forwarding a statement that the audit has been completed and that it disclosed no instances of noncompliance.[138] In describing this system ORS stated:

> To best utilize resources, ORS is using the management by exception concept. ORS requires all reports regarding matters of noncompliance to be submitted to it. For audit reports with no problems, ORS permits the option of submitting the audit report or a letter stating the audit was made, but there were no matters of noncompliance. We believe our agreements with State auditors and our random sample audits will uncover any significant trend of misstatements in letters stating that there were no compliance problems.[139]

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[137] The Audit Guide directs only that "any determination" in the civil rights questions (see note 134 supra) that "indicates a possible discriminatory action shall be disclosed in the audit report." Id. at V-4. ORS did not state what answers or configuration of answers should be taken as an indication of possible discrimination. For example, the Audit Guide does not state under what circumstances the absence of a formal policy on nondiscrimination in employment (see inquiry (g), note 134 supra) should be disclosed in the audit report.

[138] Audit Guide, supra note 130.

[139] Attachment 2 to 1975 Watt letter, supra note 14.

A combination of factors results in a procedural deficiency. ORS remains totally reliant on the auditors' largely unguided judgment, and will not in all cases receive the information gathered, which could be reviewed by ORS.[140] Until ORS has sufficient evidence that recipient governments have acquired the necessary expertise to draw accurate conclusions from information gathered, ORS should routinely conduct a complete and systematic analysis of at least a random sample of audits which are not deemed by the recipients to disclose possible instances of noncompliance.

ORS is authorized to accept State, local, and private audits of recipients' expenditures of GRS funds if the Director of ORS determines that the audits and audit procedures are sufficiently reliable to enable ORS to carry out its duties.[141] ORS has formulated a three part system[142] whereby 25 states will be responsible for the regular audit of approximately 13,000 local government recipients;[143] another 3,000 government audits will be conducted by private accounting firms;[144] and each year a sample of 300 recipients from among the remaining 22,400 will be audited by ORS staff.[145]

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[140] Indeed, in some instances, ORS has eliminated the option of forwarding copies of audit reports which auditors believe do not disclose possible noncompliance. In these cases, ORS will routinely receive only a blanket statement that no noncompliance was disclosed. This is in individual agreements with States. See p. 57 supra. Nonetheless, ORS has stated, "We take exception to your statement... regarding a procedural deficiency...." Attachment 2 to Watt letter, supra note 14.

[141] 31 U.S.C. § 1243(c)(1) (Supp. III, 1973) and 31 C.F.R. § 51.41 (c).

[142] Appropriations Hearings, supra note 86, at 306-07.

[143] ORS anticipated that these 25 States would be ones which normally perform audits of their local governments unrelated to general revenue sharing. Id. at 306.

[144] These 3,000 audits would be of local governments which are normally audited by private accounting firms on a periodic basis. Id. at 307.

ORS has been slow in finalizing arrangements for its audit program. In late spring 1973 ORS projected that in fiscal year 1974 it would certify for adequacy a total of 45 existing audit systems.[146] As of November 1974 ORS had not proceeded with its plans for certification.[147] ORS reported that when requested staff increases did not materialize, it suspended its plans for certifying systems and decided that its first priority was to get as many States as possible signed up for a voluntary State audit program, regardless of the quality of their audits.[148] The ORS agreements with States expressly provide that ORS can review State audits from time to time as necessary to ensure quality, but as of November 1974, ORS had not drawn up a program for checking the quality of the State audits. Until such time as ORS can assure that the civil rights components of the audits are regularly of high quality, however, the existence of an audit system cannot be reviewed as adequate even as a mere aid to identifying possible civil rights problems.

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145. Id. at 306-07.

146. Office of Revenue Sharing, Department of the Treasury, "ORS Compliance Division, Workload Assumptions, Staffing Pattern, and Anticipated Output for Fiscal Year 1974" (undated draft).

147. Telephone interview with Jack L. Gary, Jr., Audit Program and Development Officer, Compliance Division, Office of Revenue Sharing, Department of the Treasury, Nov. 21, 1974.

148. Id. ORS has stated:

> ...ORS is criticized for not yet drawing up a program for checking the quality of State audits. In our judgment, the interest of the revenue sharing program is best served by completing the negotiations of the State audit agreements. ORS now has 34 audit agreements with the states and this phase of the program is almost complete. Accordingly, ORS is now in a position to proceed with developing audit procedures including a program to review State audit officers. Accordingly, we believe the criticism...is premature. Attachment 2 to 1975 Watt letter, supra note 14.

Although it has been plain from as early as 1972 that ORS intended to develop a tripartite system,[149] as of late fiscal year 1974, ORS did not plan to implement the program until sometime during fiscal year 1975 and 1976.[150] By November 1974 ORS had signed agreements with 21[151] of the target figure of 25 States which ORS had set.

By November 1974, ORS had received 2,850 audit documents from recipients--both statements[152] attesting to the absence of any indication of noncompliance and audits. ORS had at that time reviewed 1,500, more than one half of these documents.[153] In January 1975 ORS reported that it had found "about 180 actual noncompliance problems."[154] As of November 1974, ORS had not determined precisely how many noncompliance problems involved civil rights.[155]

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[149] Office of Revenue Sharing, Department of the Treasury, What General Revenue Sharing Is All About 14-15 (1972). See also, Graham W. Watt, Director, Office of Revenue Sharing, "Revenue Sharing Status Reviewed," County News 5, 12 (Apr. 27, 1973). County News is a weekly publication of the National Association of Counties.

[150] Appropriations Hearings, supra note 86, at 306-07

[151] Gary interview, supra note 147. The first agreement, signed in May 1974, was with New York State. See Memorandum of Agreement Between Director, Office of Revenue Sharing, Department of the Treasury, and State Comptroller, State of New York, with Regard to the Audit of Revenue Sharing Entitlements Paid to the State of New York and Units of Local Government of the State of New York, May 20, 1974. Agreements with the other States are similar to the New York agreement. 1974 Murphy and Steen interview, supra note 44. A twenty-second State (Alabama), while declining to sign an agreement, has undertaken nonetheless to participate in the ORS cooperative State audit program. Id.

[152] These statements are discussed on p. 57 supra.

[153] Gary interview, supra note 147.

[154] Attachment 1 to Watt letter, supra note 14.

[155] Gary interview, supra note 147.

D. Compliance Reviews

Serious omissions from ORS' program are preaward[156] and postaward civil rights compliance reviews, although ORS apparently views that it would be inapplicable for these elements to be included in its program. ORS has stated:

> "Pre-award and post-award" compliance reviews are terms clearly belonging to Title VI grant agencies... the logic of these concepts has no application to General Revenue Sharing and is,

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[156] ORS appears not to conduct preaward compliance reviews in part because it believes it lacks the authority to defer funds in the event of a finding of discrimination. See letter from Edward C. Schmults, General Counsel, Department of the Treasury, to Representative Don Edwards, Chairman, Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary, Oct. 24, 1973. Fund deferral is discussed further in section IV G infra. The logic of preaward reviews is straightforward: Federal monies are disbursed subject to the conditions attached by the Government. Where a condition is that there be no discrimination in any program or activity to receive those funds, the power exists for a Federal administrator to assure himself or herself that no lawful discrimination exists in advance of funding--this provides a reasonable basis in fact for believing it likely that there will be no discrimination after funding occurs. Thus can an administrator responsibly believe that Federal dollars will not be used to support discrimination unlawful under the Constitution or Federal statutes.

Preaward reviews could be provided for in a variety of ways. For example, all recipients-to-be, or a selected sample thereof, under a given program could be subjected to a full field review by Federal staff as a matter of routine.

> in our judgment, a concept that attaches to the Title VI categorical grant programs.[157]

There is little evidence however, that the Title VI requirements do not apply to GRS funds.[158] Moreover, the tools of "preaward" and "postaward" compliance reviews are not restricted to assessment of compliance with Title VI, but are used in many civil rights programs.[159] They are singularly absent, however, from ORS' program. Neither the compliance visits nor the audits can be considered true civil rights compliance

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157. Attachment 2 to 1975 Watt letter, supra note 14. ORS continued:

> "Accordingly, our judgments will not concur on this particular matter, and we believe the statements in the draft report are erroneous." Id.

ORS also stated:

> We do not concur with the comments in the draft report [p. 61 et seq.] on pre-award compliance reviews....We believe our position to be the correct one from the legal viewpoint as well as the operational viewpoint. Obviously, the Commission does not concur with our interpretation. We feel strongly that the draft report is erroneous. Id.

158. The applicability of Title VI requirements to GRS funds is discussed in detail on pp. 6-8, supra.

159. A prime example is Executive Order 11246, as amended, which prohibits employment discrimination on the basis of race, religion, sex, and national origin in Federal contracts. Both preaward and postaward reveiws are regularly conducted by Federal agencies with responsibility for ensuring compliance with the Executive Order. See U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. V Employment (in preparation).

reviews, and thus ORS has, in fact, not conducted any compliance reviews.[160]

Although, like compliance reviews, the visits were and audits are conducted onsite, the visits did not and audits do not include exhaustive reviews of relevant records and interviews with the recipient's employees, beneficiaries, and representatives of minority and women's rights organizations. Most importantly, true compliance reviews would focus on whether a recipient is in compliance with the nondiscrimination requirement of the law and administrative regulation. The questions issued in the *Audit Guide* and those used in the compliance visits had more to do with assessing general procedural protections for civil rights than with determining whether there was compliance in an specific program or activity funded under ORS, an example of which is looking at the presence of civil rights agencies and offices.[161] Thus, ORS has no systematic and indepth method of determining that recipients of general revenue sharing funds do not discriminate in programs or activities conducted with those funds.[162]

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[160] A civil rights coalition has also charged that ORS has never conducted "any self-generated, periodic compliance checks on recipients." Letter from Harold Fleming, Chairman, Federal Programs Task Force, Leadership Conference on Civil Rights, and others, to James N. Purcell, Jr., Chairman, Revenue Sharing Working Group, Office of Management and Budget, Oct. 1, 1974.

[161] See notes 115 and 134 *supra*, for listings of the questions asked.

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[162] ORS stated "we believe /this sentence/ is factually incorrect." Attachment 2 to 1975 Watt letter, *supra* note 14. A recent study of general revenue sharing by private groups, however, supports the Commission's assertion. The study was conducted by the National Revenue Sharing Project of the National Clearinghouse on Revenue Sharing, which is sponsored by the Center for National Policy Review together with the League of Women Voters Education Fund, the National Urban Coalition, and the Center for Community Change. The project also found that existing Federal compliance mechanisms under general revenue sharing are inadequate. This finding was especially significant because the study also found indications of widespread discrimination by local governments, often in GRS-funded activities. National Clearinghouse on Revenue Sharing, *General Revenue Sharing in American Cities: First Impressions* (December 1974). The National Revenue Sharing Project studied some 60 localities over an 18-month period. *First Impressions* is based on data gathered at 33 of the project sites--26 cities of over 50,000 population and 7 urban/suburban counties. The project obtained public employment figures for ten of its study sites, and found that discriminatory patterns in public employment, especially in police and fire departments, were well documented in all ten sites. In 17 of the 26 cities reviewed, there was some evidence that low income and minority areas were not receiving police protection, garbage pickup, and other municipal services on a par with other areas. The project determined that litigation on employment discrimination could possibly involve GRS funds in as many as 12 of the 26 cities. The project also found that although more than three-quarters of the local recipient governments reviewed had some form of human rights commission or equal employment opportunity office, there was "little indication" that these offices were "strong or effective." *Id.* at 13. ORS reported:

> The report of the National Clearinghouse on Revenue Sharing (*General Revenue Sharing in American Cities: First Impressions*) is well-known to us and contains many helpful criticisms and suggestions, especially in the area of citizen participation. Attachment 2 to 1975 Watt letter, *supra* note 14.

A number of private organizations have undertaken general monitoring of GRS, not only to report violations of the Act, but also to assess the entire experience under general revenue sharing, including the uses of funds, effects of allocation formulas, and degree of citizen participation. These groups include the Brookings Institution and the Southern Regional Council. In addition, an undated publication of the National Clearinghouse on Revenue Sharing "Preliminary Checklist of Private and Public Organizations Involved in Revenue Sharing Activities," lists 33 such private organizations.

In early 1974 ORS stated that plans were being drawn up for the conduct of civil rights compliance reviews in fiscal year 1975.[163] As of October 1974, however, it appeared that implementation of these plans would be postponed indefinitely for lack of staff.[164]

E. Complaints

ORS apparently believes that, given the limitation on its resources, its most effective compliance weapon is complaint processing. ORS has stated:

> As it would be next to impossible for ORS to review all or any major part of the 39,000 recipients governments, the policy decision was made to enforce the law strictly against known offenders. Thus, as is the case with the [Internal Revenue Service], 165 the law will be enforced by punishing certain highly-visible governments.

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[163] Letter from Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, to Harold Fleming, Chairman, Federal Programs Task Force, Leadership Conference on Civil Rights, Feb. 4, 1974.

[164] Murphy telephone interview, supra note 54. ORS declined to provide these plans to Commission staff because they were not being implemented. Id.

[165] ORS appears to compare itself with the Internal Revenue Service of the Department of the Treasury. This comparison overlooks the fact that the IRS routinely performs analyses of income tax filings and conducts field reviews where appropriate. The IRS thus has a compliance review system upon which it relies for detection of offenders. Moreover, the IRS does conduct a species of civil rights compliance reviews. The IRS is responsible for reviewing the tax-exempt status of private schools. One condition of this status is that there be no racial discrimination in such schools. IRS annually targets a percentage of the private schools with individual tax exemptions in each of seven regions of the country for civil rights compliance reviews. There are approximately 5,000 private schools with individual tax exemptions. For a discussion of the civil rights responsibilities and enforcement efforts of the Internal Revenue Service, see U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, Vol. III, Education, ch. 2 (1975).

> As word begins to spread that ORS aggressively processes citizen complaints, pressure will bear upon recipient governments to comply lest one of their own citizens bring a complaint. The threat of a[n] ORS initiated compliance review would be no stronger than the possiblity of such an audit initiated by [i.e., in response to a complaint filed with ORS by] an outraged citizen.
>
> Thus, as even systematic compliance reviews could hardly hope to cover a small proportion of the 39,000 governments, nor would they increase the intimidation factor, they would hardly justify the increased administrative costs to the Federal and recipient governments. 166.

Compliance reviews, however, are a foremost means of detecting offenders. Complaint-oriented compliance systems cannot expose the full range and depth of problems of noncompliance.[167]

ORS implies that a compliance review system would result in increased administrative expense for recipient governments.[168] ORS provides no estimate of the expense to recipients, which would largely consist of the cost of providing work space and making employees available for answering questions and providing documents to reviewers.[169]

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[166] Attachment to Parker letter, supra note 39.

[167] This viewpoint has also been endorsed by the Assistant Attorney General of the Civil Rights Division, who has remarked that complaint investigation:

> ...is an essential element of any enforcement program, but only within reasonable limits. While complaints are frequently a signal of discrimination in a project and should be thoroughly investigated, they are too haphazard to form the basis of a systematic and efficient enforcement program. Pottinger speech, supra note 84.

[168] Attachment to Parker letter, supra note 39.

[169] Recipients are in any event duty-bound to provide the Secretary "access to, and the right to examine, such books, documents, papers, or records as the Secretary may reasonably require for purposes of reviewing compliance." 31 U.S.C. § 1243(a)(5)(B) (Supp. III, 1973).

ORS has placed, for all intents and purposes, practically exclusive reliance upon complaint input in order to fulfill the Secretary's responsibility to ensure compliance with the nondiscrimination requirement of the Act. Nevertheless, for the first eight months or so of operations, ORS made no special effort to publicize an address to which citizens could write in order to file complaints.[170] ORS has indicated it does not plan to go into the production of posters to publicize its available complaint procedures.[171] ORS has not published any bilingual or Spanish language materials.

It was not until March 1974 that ORS published a guide directed to the public-at-large regarding the requirements of the Act and their

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170. When, in the course of a Congressional hearing, ORS was asked what effort it was making to inform citizens where to file complaints, the Director of ORS noted that the address of the Office of Revenue Sharing appeared on the planned use report required to be published in newspapers by recipient governments. Civil Rights Hearings, supra note 62.

171. Id.

[172] significance to citizens--*Getting Involved*. *Getting Involved* represents a good effort, however belated, and should be of help to interested members of the public. It includes, for example, definitions of common revenue sharing terms, a listing of community sources of information on local governments, their budgets, and how revenue sharing spending decisions are made; illustrations of citizen participation and interplay with the budget process in six named recipient governments; a planning calendar to aid in participating in GRS decisions; a checklist for understanding and evaluating the impact of GRS money in a community; an explanation of the Act and the responsibilities of recipient governments; and information on where to file complaints and what information to include when filing. *Getting Involved* was not, nor was it intended to be, a guide to the civil rights provision of the Act. It was not until November 1974, two years

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172. Office of Revenue Sharing, Department of the Treasury, *Getting Involved, Your Guide to General Revenue Sharing* (March 1974). Other agencies, public and private, moved to fill this 17-month void. See, e.g., American Friends Service Committee, *Handbook for Investigation and Action Project on General Revenue Sharing* (1973); Cabinet Committee on Opportunities for Spanish Speaking People, *Revenue Sharing and the Spanish Speaking* (January 1973); Joint Center for Political Studies, *The Minority Community and Revenue Sharing* (June 1973); Center for Community Change, *Revenue Sharing--Planned Use and Actual Use Report* (July 1973); Movement for Economic Justice, *Your Fair Share of Revenue Sharing, A Community Guide to General Revenue Sharing* (Revised May 1973); National Association for the Advancement of Colored People, *Guidelines for Branches--Revenue Sharing: Housing, Community Development, Social Programs* (April 1973); National Organization for Women, *Chapter Action Handbook: Federal Revenue Sharing* (January 1974) and Addendum, "Revenue Sharing--LEAA Police Compliance Project" (Oct. 10, 1974); National Urban League, *Revenue Sharing and the Black Community* (1973); National Urban Coalition, *A Preliminary Checklist of Information Needed for the Monitoring and Evaluation of General Revenue Sharing Funds* (1973); and RAZA Association of Spanish Surnamed Americans, *Your Fair Share of Revenue Sharing: A Community Guide to General Revenue Sharing* (1973). See also, National Clearinghouse on Revenue Sharing, "Select Bibliography on Revenue Sharing" (undated).

after passage of the Act, that an ORS-prepared guide, General Revenue Sharing and Civil Rights, for recipients and the public on civil rights was issued.[173] As of November 1974 at least 100,000 copies of Getting Involved and 85,000 copies of General Revenue Sharing and Civil Rights were printed.

Given ORS' delay in publicizing information on complaint filing, it is no surprise that the volume of civil rights complaints submitted to ORS has been fairly small. As of October 1974, ORS had received only 93 civil rights complaints. The Director of ORS cites ORS' low rate of complaints as one indicator of a high rate of compliance.[175] Even with an energetic public information campaign, however, complaints are not necessarily a sound indicator of degree of compliance. Complaints may be few

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173. General Revenue Sharing and Civil Rights, supra note 40.

174. 1974 Murphy and Steen interview, supra note 44 . As of June 1, 1974, a total of 41 civil rights complaints had been received. Revenue Sharing Hearings, supra note 39 at 23. Dr. Murphy indicated that the October 1974 count was more accurate than the June 1974 count had been. 1974 Murphy and Steen interview, supra note 44.

175. Director Watt has stated:

> Evidence available to us thus far convinces me that the vast majority of State and local governments are very conscientiously complying with the requirements in the Act. I base this conclusion on the assurances and certifications provided to the Office of Revenue Sharing by the chief executive officer by each government, on information contained in their reports of uses and plans, on studies by the General Accounting Office, on the field reviews and investigations carried out by our own Compliance staff, and on information gained from the many studies being carried out by public and private organizations. A further indication of compliance is the relatively few complaints we have received from the general public and from organizations which have a special interest in the appropriate uses of revenue sharing funds. (Emphasis added.) Revenue Sharing Hearings supra note 39, at 10.

because of unwillingness to risk becoming an object of public attention, fear of outright reprisal, ignorance of or inability to understand the Act and ORS' regulation, low expectations of the ability of an unknown bureaucracy to respond speedily and effectively to the complaint, and a perceived lack of ability to document the allegations of a complaint except as a matter of personal experience.[176] This latter reason may be particularly likely in the case of GRS, in view of the requirements indicated in its regulation for documentation of the complaint.

ORS' regulation requires that any person who wishes to file a complaint of discrimination must file "a written report setting forth the nature of the discrimination alleged and the facts upon which the allegation is based."[177] In contrast, Federal agency Title VI regulations require only a "written complaint."[178] Moreover, ORS' regulation states that a complaint will be investigated only if the complainant files a report which "shows a recipient government has failed to comply" with the nondiscrimination requirement.[179] In contrast, Federal agency Title VI regulations direct the agency to investigate any complaint which "indicates a possible failure to comply."[180]

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[176] These possiblities are discussed at greater length in U.S. Commission on Civil Rights, To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs (1973).

[177] 31 C.F.R. § 51.32(d).

[178] See, e.g., 45 C.F.R. § 80.7(b) (HEW) and 24 C.F.R. § 1.7(b) (HUD).

[179] 31 C.F.R. § 51.32(d).

[180] See, e.g., 45 C.F.R. § 80.7(c) (HEW) and 24 C.F.R. § 1.7(c) (HUD).

In a letter to this Commission, however, ORS has indicated that in practice it has only one requirement for complaint filing. ORS stated:

> Actually, the only requirement of ORS is that the complaint be in writing. ORS has initiated investigations on complaints that consisted simply of a hand-written letter. [181]

To the extent that ORS' statement indicates a relaxation of the complaint filing requirement included in its regulation, this is to ORS' credit. ORS, however, does not appear to have changed the requirement as it appears in the regulation. It is important that ORS accompany changes in requirements with changes in its written regulations. Few potential complainants are likely to be aware of its policy as announced in letters to this Commission. By revising its written regulations, ORS would make its changes more binding and more public.

In 1974 a significant number of complaints which had been received by ORS were filed not by individuals, but by organizations, to which adherence to ORS' provision in the regulation concerning complaint filing is not a great problem,[182] indicating that citizens may not have been aware of their right to file complaints. Another indication is that, as of October 1974, only "about a half dozen" complaints of sex discrimination had been filed.[183]

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[181] Attachment 2 to 1975 Watt letter, supra note 14.

[182] ORS has reported that the NAACP generated nearly half of all complaints received during the first six months of operations under GRS. General Revenue Sharing and Civil Rights, supra note 40, at 11.

[183] 1974 Murphy and Steen interview, supra note 44. As of February 1974, only one sex discrimination complaint had been received. Steen interview, supra note 40. It involved allegations predating passage of the Act and for this reason ORS determined it was without jurisdiction in the matter. September 1973 Murphy interview, supra note 124.

In addition, few complaints appeared to have been filed by persons of Spanish speaking background.[184]

Lack of staff appears to have hampered ORS' complaint handling. As of February 1974, ORS had not been able to implement plans for an internal control system[185] over its complaint handling procedures and work flow[186] and it was not until October 1974 that ORS assigned a person to oversee these controls.[187]

As of the beginning of June 1974, ORS reported it had resolved only 18 civil rights complaints,[188] fewer than 50 percent of complaints received,[189] a rate slightly lower than that for any other class of complaints submitted to ORS.[190] Moreover, ORS appeared to be willing to consider complaints

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[184] Dr. Robert Murphy, ORS' Compliance Manager, has expressed concern over this situation. Attachment 1 to 1975 Watt letter, supra note 14.

[185] The primary objective of this system is to ensure timely acknowledgment of complaints and follow-up where ORS inquiries of recipients are not answered.

[186] Steen interview, supra note 40.

[187] Telephone interview with Robert T. Murphy, Compliance Manager, Office of Revenue Sharing, Department of the Treasury, Nov. 21, 1974.

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[188] Of the 18 complaints resolved, six were closed for lack of jurisdiction. In one of these six (Los Angeles, Cal.--allegation of sex discrimination in promotion), ORS believed it lacked jurisdiction because the incident complained of occurred before the effective date of the Act. In the remaining five cases it appeared that GRS funds were not involved in the areas complained of (e.g., Atlanta, Ga. and Champaign, Ill.--police employment; Gatesville, Tex.--street improvements). A seventh complaint was closed after it was withdrawn by the complainant. It appeared in any event not to involve GRS funds. *Revenue Sharing Hearings*, *supra* note 39.

Another five complaints, although within ORS' jurisdiction, were determined not to be sustantiated by fact. They included, for example, Parsons, Kansas (privately-owned golf course which received GRS funds was determined by ORS to be open to the public); Pittsburgh, Pa. (allegations involved minority contracting and citywide employment); and Rankin County, Miss. (road surfacing, admission to convalescent homes, segregation of county prisoners). A thirteenth complaint, against Farmville, N.C., appeared not to involve discrimination. The allegation was simply that no public hearing had been held prior to appropriating GRS funds. (Such hearings are required only where State or local law so requires.) ORS satisfied itself that a hearing had been held.

In the remaining five cases, ORS both had jurisdiction and found noncompliance with the nondiscrimination requirement. ORS considered these cases to be resolved because it believed the respondents had come into compliance. In Dane County, Wisconsin, a local chapter of the National Urban League alleged that only 0.4 percent of 1,180 full-time county employees were minorities. ORS' inquiries led to a meeting between the complainant and the county, after which the two agreed upon an affirmative action plan. The four other cases are: Dover, Del. (discrimination in admission practices of a volunteer fire company, discussed on pp. 75-78 *infra*); Cranite Falls, Minn. (failure to comply with publication requirements of the Act); Henderson, Tex. (admission to city-owned swimming pool, discussed on pp. 74-75 *infra*); and Mobile, Ala. (discrimination in capital construction program).

[189] *Revenue Sharing Hearings*, *supra* note 39 at 23.

[190] *Id*. The resolution rate for "civil rights/discrimination" complaints was in fact 44 percent (not including one complaint which was, as of December 1974, in court). The rates for the three other classes set out by ORS--"financial/accounting," "legal/compliance with applicable provisions," and "miscellaneous (publication, matching funds, Davis-Bacon Act problems)"--were 56, 50, and 55 percent respectively.

"resolved" without sufficient evidence that the violations uncovered had been terminated. For example, as a result of a complaint filed in August 1973 regarding a policy of racial and ethnic origin discrimination in admission to a swimming pool leased by the city of Henderson, Texas to a private manager,[191] it was proposed by ORS that a clause be added to the lease governing the pool requiring that there be no discrimination.[192] In June 1974 ORS reported that the problem was resolved although it apparently had not reviewed any revised lease. The Director stated:

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[191] ORS' own description of this complaint, as reported to Congress, is as follows:

> A National Guard Unit was returning to Galveston and stopped overnight in Henderson, Texas. The complainant, a Spanish-American Guard Officer and a Galveston, Texas City Council member, alleged discriminatory operation of /a/ swimming pool leased by the City of Henderson. A group of Black national guardsmen were turned away from the pool while White members of the same guard unit were allowed to swim. The Blacks were to go to "their pool" located in the other (Black) part of town. The Guard Officer submitted signed affidavits from each of the guardsmen (both Black and White) concerning the alleged discrimination. The land on which the pool was located was donated in the 1940's to Henderson with the stipulation that it would be for Whites only. ORS monies had been spent in the City's recreation budget, under which the City leased the pool to a manager whose entire salary came from pool admissions. The City had no direct jurisdiction over the pool as the manager set his own admission policies. (Emphasis in original). Revenue Sharing Hearings, supra note 39, at 56.

[192] Steen interview, supra note 40.

> This problem has been resolved by a direct order from the Mayor to the pool manager to eliminate discrimination, and by entry of specific nondiscrimination provision in the new pool lease and agreement to be signed in August of 1974.[193] ORS plans an on-site inspection of Henderson in the late summer of 1974 to assure that everyone is being allowed the use of the public swimming pool. 194

In October 1974, moreover, after ORS staff had had an opportunity to review the revised lease, ORS staff stated that the new lease did not contain specific nondiscrimination provisions, and that no onsite inspection was made in the late summer of 1974, but that such a visit would be made during the early summer of 1975.[195]

Another example of a case which ORS reported as "resolved"[196] occurred in Dover, Delaware. In Dover, after the Robbins Hose Company, a volunteer fire company, had been allocated GRS funds for the construction of a new firehouse and a portion of the funds had been spent for architects' fees, a complaint was filed with ORS by the Central Delaware Chapter of the National Association for the Advancement of Colored People (NAACP). The complaint alleged discriminatory admission practices by the fire company.[197] Before

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193. There is apparently some confusion as to the date the new lease was executed. In January 1975 ORS stated that "a new five-year lease was executed in March 1974." Attachment 2 to 1975 Watt letter, supra note 14.

194. Revenue Sharing Hearings, supra note 39, at 56.

195. 1974 Murphy and Steen interview, supra note 44.

196. Revenue Sharing Hearings, supra note 39, at 53.

197. Steen interview, supra note 40.

the mid-1960's, a clause in the company's charter flatly declared that only "Caucasians" could be members. Although this had been removed, in 1973 the company's by-laws required the endorsement of applications by three "life" members of the fire company and a majority vote of all members before one could join the company.[198] There had never been a black member of the fire company in its 92-year history.[199]

Neither ORS, nor any other Federal agency,[200] has issued guidelines for minority or female membership in volunteer fire departments, and in reviewing admission policies of volunteer departments such as the Robbins Hose Company, ORS had to devise the standards of nondiscrimination which were to be used. In January 1975 ORS was able to report that:

> ...One black applicant was accepted into membership of the Voluntary Fire Department in May 1974 and the second black was accepted into membership in June 1974. 201

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198. Id.

199. Revenue Sharing Hearings, supra note 39, at 53.

200. No other Federal agency offers assistance which can be used by fire departments on such a widespread basis.

201. Attachment 1 to 1975 Watt letter, supra note 14. ORS also stated:

> We are pleased with our corrective action in the Dover, Delaware, Fire Department matter because we long recognized that no other Federal agency had jurisdiction to become involved in that matter. Attachment 2 to 1975 Watt letter. Id.

Nonetheless, the standards implicit in ORS' acceptance of the Robbins Hose Company's amended by-laws are disappointing.[202]

It does not appear that any provisions were added to the by-laws to ensure acceptance of persons on the basis of fire fighting qualifications. Although the provision of the earlier by-laws requiring endorsement by three "life members" was omitted, the by-laws permit a majority vote to override the recommendation of acceptance made by a membership investigating committee of the fire department. It appears, moreover, that no criteria were put forth for assuring nondiscrimination by the investigating committee, and, most significantly, that the fire company was not directed to take affirmative steps to overcome the effects of their past discriminatory practices, as for example, affirmatively recruiting minority fire fighters. Indeed, quite to the contrary, the Office of Revenue Sharing appeared to suggest that the burden for recruitment lay with the NAACP, which had originally filed the complaint.[203]

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[202] ORS reported that in order to resolve the complaint, the Robbins Hose Company agreed "that the fire company's by-laws be changed to remove the appearance and possible effects of past discrimination. The by-laws were extensively amended in April 1974." Revenue Sharing Hearings, supra note 39, at 53. The by-laws were amended so that all recommendations for membership made by the fire company's membership investigating committee would be accepted unless a majority of the company voted against the applicant. 1974 Murphy and Steen interview, supra note 44.

F. Data Collection

In order to evaluate the extent to which programs and activities funded with GRS funds are operated nondiscriminatorily and do not exclude persons on the ground of race, color, national origin, or sex, it is necessary for ORS to collect data on the race, ethnic origin, and sex of program participants and of the population eligible to participate in the entitlement-assisted activity.[204]

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[203] It has been alleged that ORS advised the NAACP chapter filing the complaint that it had a duty to recruit applicants. Telephone interview with William R. Morris, Director, Housing Programs Department, NAACP, Jan. 17, 1974, and Wilmington, Del. News Editorial, at 18, Col. 1, Dec. 4, 1973. The News stated:

> the federal official told the NAACP, it is now that organization's duty to help the company in efforts to recruit qualified black members. It might be well for the NAACP--now that it has used the leverage of the revenue sharing funds to make its point--to heed the admonition about performing its further duty. Id.

When asked about such allegations, the Federal official in question queried, "What would you do?" He stated ORS did not believe it could insist that the fire company recruit, because it was not strictly an "employer," but a volunteer membership association. Steen interview, supra note 40. Presumably Mr. Steen was referring to the fact that Title VII specifically exempts bona fide membership clubs that have tax exempt status. 42 U.S.C. § 2000e(b) (Supp. II, 1972). One EEOC Assistant General Counsel has stated, however, that he would argue that this exemption is inapplicable to volunteer fire departments which plainly perform a public service. Telephone interview with Charles Reischel, Assistant General Counsel, Amicus Branch, Appeals Division, Office of General Counsel, EEOC, Dec. 3, 1974.

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[204] The necessity of such data has been recognized by many Federal agencies. Federal agency regulations implementing Title VI of the Civil Rights Act of 1964 require recipients to keep such records and submit such compliance reports as may be required by the grantor agency. These regulations specifically state that "In general, recipients should have available...racial and ethnic data showing the extent to which members of the minority groups are beneficiaries of federally assisted programs." This requirement extends to subrecipients as well. See, e.g., Title VI regulations for the Department of Commerce, 15 C.F.R. § 8.7(b); the Department of Housing and Urban Development, 24 C.F.R. § 1.6(b); and the Department of Labor, 29 C.F.R. § 31.5(b). Moreover, the Office of Management and Budget (OMB) has gone on record as recognizing the utility of data on the beneficiary population of Federal programs as a means of assessing program operations and budgetary needs: in 1972, OMB requested that Federal agencies submit data on program impact on racial and ethnic minorities for use during the review and preparation of the fiscal year 1974 budget. See OMB Bulletin 73-3, Sept. 1, 1972. The importance of racial and ethnic data collection is discussed in Interagency Racial Data Committee, *Racial Data Policies and Capabilities of the Federal Government* (1971) and *Establishing A Federal Racial/Ethnic Data System* (1972); and U.S. Commission on Civil Rights, *To Know or Not to Know: Collection and Use of Racial and Ethnic Data in Federal Assistance Programs* (1973).

ORS responded:

> The data suggested in the draft report /in Section IV F/ are required to be kept at least in the employment area by EEOC regulations which cover all local governments having 15 or more employees. Those regulations became effective about the time ORS began its compliance visits in May 1973. Accordingly, we do not believe there is need for two separate Federal agencies to require public employers to keep the same type of statistical data. Attachment 2 to 1975 Watt letter, *supra* note 14.

It should be noted, however, that the data referred to in this section relate solely to data on services provided under the GRS program. These are data on the race, ethnic origin, and sex of program participants and persons eligible to be program participants--the program beneficiaries and potential beneficiaries. They are not maintained by EEOC.

Despite encouragement from this Commission and civil rights organizations,[205] however, ORS has not incorporated in its regulation such specific language concerning the need for beneficiary data as is included in Federal agency Title VI regulations. Nonetheless, the Office of Revenue Sharing clearly has the authority to collect such data. It is permitted to collect any information from recipient governments necessary for ascertaining compliance with the Act.[206]

Potential vehicles for gathering needed information are the planned and actual use reports.[207] Through September 1974 they had not been used for this purpose. One of the reasons ORS gives for the absence of a data collection requirement is the "no strings attached" philosophy under which it intends to administer the GRS program. It aims to limit its demands upon the recipient governments to the bare minimum required by law. Nonetheless, ORS at one time required on the planned[208] and actual use forms considerable data which were not required by law.[209]

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[205] See, for example, attachment to letter from Stephen Horn, Vice Chairman, U.S. Commission on Civil Rights, to George P. Shultz, Secretary of the Treasury, Jan. 5, 1973; and letter from Harold C. Fleming, Chairman, Task Force on Federal Program Coordination, Leadership Conference on Civil Rights, to Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, Mar. 19, 1973.

[206] The regulations implementing the State and Local Fiscal Assistance Act of 1972 permit the Secretary of the Treasury to "require each recipient government...to submit such annual and interim reports...as may be necessary to provide a basis for evaluation and review of compliance and effectiveness of the provisions of the Act and regulations...." 31 C.F.R. § 51.10(a).

[207] Planned and actual use reports are discussed briefly, on p. 4 supra. They are discussed and evaluated in detail in Making Civil Rights Sense Out of Revenue Sharing Dollars, supra note 7.

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[208] ORS has stated:

> We think there is some confusion here by your statements that the regulations require that the recipient government provide data regarding discrimination prior to receipt of entitlements, and in the authority of ORS to require such data when it conducts a compliance review. Most certainly, the ORS clearly has authority to collect such data, but whether it has authority to collect such data as a prerequisite to the payment of entitlements is an entirely different matter. We believe the writer of this section has failed to distinguish clearly between the application grant program and the General Revenue Sharing Program. Attachment 2 to 1975 Watt letter, *supra* note 14.

The Commission believes that ORS has all the authority to enforce its nondiscrimination requirement that is vested in Federal agencies with Title VI responsibilities. See pp. 7-10 *supra*.

[209] For each operating and maintenance expenditure, recipients have had to state the percent planned or expended for maintenance and for new or expanded services. For each capital expenditure, the recipient has had to state the percent planned or expended for equipment, construction, land acquisition, and debt retirement. Recipients have also been required to inform ORS of the anticipated effect of the availability of general revenue sharing funds upon the borrowing requirements of the jurisdiction and upon its taxes, and the name of the newspaper in which the planned or actual use reports are published and the dates of publication. All but the "anticipated effect" and "publication information" requirements were dropped by ORS in the summer of 1974.

G. Enforcement Mechanisms

The Act provides that whenever the Secretary determines that a recipient is not in compliance with the nondiscrimination provision, he or she shall notify the Governor of the State[210] and request the Governor to secure compliance. If within a reasonable time[211] the Governor fails or refuses to secure compliance, the Secretary is authorized to:

(1) refer the matter to the United States Attorney General with a recommendation that an appropriate civil suit be instituted;

(2) exercise the powers and functions provided by Title VI; or

(3) take such other action as may be provided by law.[212]

The Secretary has not spelled out for the public the criteria which will guide the Secretary in deciding which of these courses of action will be pursued; indeed, he has not detailed what other actions provided by law are considered available for the enforcement of the Act.

The incorporation of Title VI by reference in the Act to Title VI's "powers and functions" has been taken by the Secretary to mean that the procedures established by Federal agencies for fund termination under

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[210] The Act provides only for notification of Governors, not of local government chief executive officers. 31 U.S.C. § 1242(b) (Supp. III, 1973). Thus, whether a State or a unit of local government is believed not to be in compliance, the Governor is to be notified and requested to secure compliance.

[211] The Secretary has provided that a reasonable time shall not exceed 60 days. 31 C.F.R. § 51.32(f)(1).

[212] 31 U.S.C. § 1242(b) (Supp. III, 1973).

Title VI are to be employed under general revenue sharing.[213] As a result, the procedures for administrative enforcement under GRS are as complex as under Title VI.

Figures 2 and 3 show the sequence of steps of ORS activity following a determination of noncompliance, which include an attempt to achieve voluntary compliance, notice and opportunity for a hearing, and reviews and appeals from hearings. The initial step is a formal notification to the recipient of its noncompliance, which allows the recipient up to 60 days to develop an acceptable plan of resolution. If a recipient continues or refuses or fails to come into compliance and the Office of Revenue Sharing determines to take administrative action, an administrative hearing is initiated by the Director of ORS. The Senate Finance and House Ways and Means Committee are notified of the administrative law judge's decision. The Secretary of the Treasury makes the final decision concerning fund cut off. In the course of the entire procedure there are two specific opportunities for the recipient government to voluntarily come into compliance.[214] Moreover, at any time during the procedure the recipient government and ORS may reach agreement and terminate the proceedings.[215]

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213. While the Act clearly states that the Secretary may exercise the "powers and functions" provided by Title VI, it does not state that Title VI procedures must be followed. Therefore, it could be argued that steps in the Title VI administrative process, such as notice to Congress, are unnecessary under GRS.

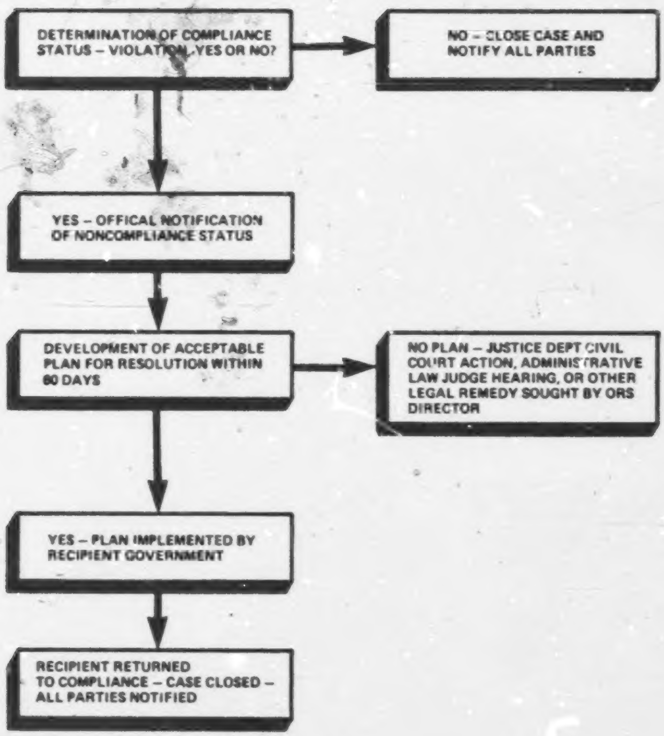
214. These are after official notification of noncompliance status and after the administrative law judge renders a decision. See Figures 2 and 3 infra. General Revenue Sharing and Civil Rights, supra note 40, at 8 and 10.

215. Id.

FIGURE 2

ORS Compliance Process

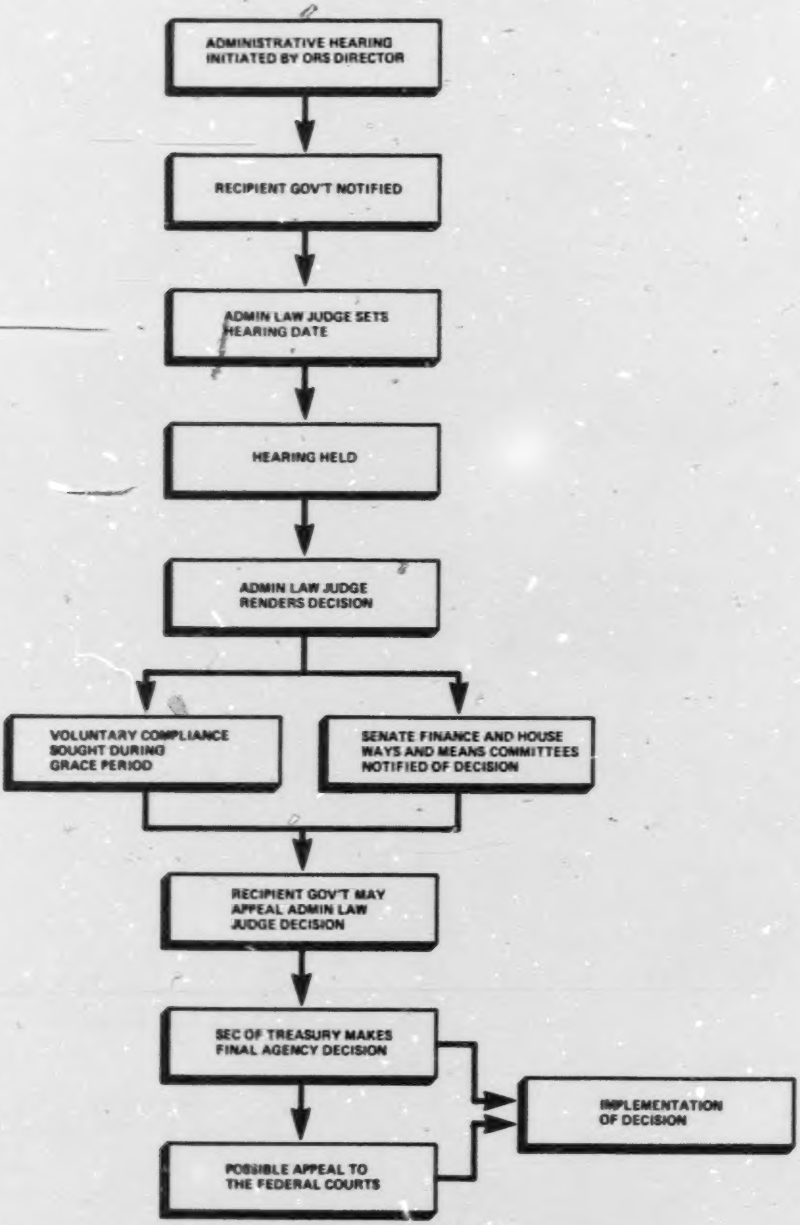
Following Field Investigations


DETERMINATION OF COMPLIANCE STATUS – VIOLATION, YES OR NO?
NO – CLOSE CASE AND NOTIFY ALL PARTIES
YES – OFFICAL NOTIFICATION OF NONCOMPLIANCE STATUS
DEVELOPMENT OF ACCEPTABLE PLAN FOR RESOLUTION WITHIN 60 DAYS
NO PLAN – JUSTICE DEPT CIVIL COURT ACTION, ADMINISTRATIVE LAW JUDGE HEARING, OR OTHER LEGAL REMEDY SOUGHT BY ORS DIRECTOR
YES – PLAN IMPLEMENTED BY RECIPIENT GOVERNMENT
RECIPIENT RETURNED TO COMPLIANCE – CASE CLOSED – ALL PARTIES NOTIFIED

Source: Office of Revenue Sharing, Department of the Treasury, General Revenue Sharing and Civil Rights 8 (November 1974).

FIGURE 3

ADMINISTRATIVE LAW JUDGE HEARING STEPS


ADMINISTRATIVE HEARING INITIATED BY ORS DIRECTOR
RECIPIENT GOV'T NOTIFIED
ADMIN LAW JUDGE SETS HEARING DATE
HEARING HELD
ADMIN LAW JUDGE RENDERS DECISION
VOLUNTARY COMPLIANCE SOUGHT DURING GRACE PERIOD
SENATE FINANCE AND HOUSE WAYS AND MEANS COMMITTEES NOTIFIED OF DECISION
RECIPIENT GOV'T MAY APPEAL ADMIN LAW JUDGE DECISION
SEC OF TREASURY MAKES FINAL AGENCY DECISION
IMPLEMENTATION OF DECISION
POSSIBLE APPEAL TO THE FEDERAL COURTS

NOTE: At any time during this procedure the recipient government and ORS may reach agreement and terminate the proceedings.

Source: Office of Revenue Sharing, Department of the Treasury, General Revenue Sharing and Civil Rights 10 (November 1974).

After a final administrative determination of noncompliance, all GRS entitlement funds which have been spent in the noncomplying program or activity[216] are declared forfeited:[217] the Secretary may either deduct an equivalent amount from future payments or refer the matter to the Attorney General for civil action to recover the funds.[218] In addition, the Secretary has a mandatory duty to withhold all future entitlement funds from the noncomplying recipient "until such time as he is satisfied that there will be compliance...."[219]

Sanctions need not be limited to instances in which GRS funds have already been spent. Deferral of funds may be used in instances in which it is clear that GRS funds will be used to finance a program or activity which will violate the nondiscrimination provision.[220]

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[216] ORS defines "program or activity" as "any function conducted by an identifiable administrative unit of the recipient government, or by any unit of government or private contractor receiving entitlement funds from the recipient government." 31 C.F.R. § 51.32(a).

[217] The financial penalty for a civil rights violation, however, is not as harsh as that for violating the priority expenditure restriction. A local government must pay 110 percent of the amount spent in nonpriority areas. See 31 C.F.R. § 51.31(c).

[218] 31 C.F.R. § 51.32(f)(3)(v).

[219] Id. The decision of an administrative law judge may be reviewed by the Secretary of the Treasury upon the request of the respondent or the Director of ORS, or upon the Secretary's own motion. In such cases, the Secretary's decision is the final agency decision; in the absence of appeal or the Secretary's own motion, the decision of the administrative law judge constitutes the final agency decision. Review either of an administrative law judge's decision which has become final or of a final order of the Secretary may be sought from the United States court of appeals for the circuit in which the respondent unit of government is located. Upon a petition for review, the Secretary is to file with the court the record of the administrative proceeding on which the agency determination is based. Petitioners for review are to be restricted in their arguments to the court to those raised in the administrative proceeding below, and the findings of fact of the Secretary, if deemed by the reviewing court to be supported by substantial evidence, are to be conclusive. The courts of appeals have jurisdiction to affirm or modify the action of the Secretary or to set it aside in whole or in part. The judgement of a court of appeals is subject to Supreme Court review. See 31 U.S.C. § 1242(b)(2), 1263 (Supp. III, 1973); 42 U.S.C. § 2000d-2 (1970); 31 C.F.R. §§ 51.50 to 51.75.

The sanction of fund deferral provides Federal agencies with leverage to ensure that funds will be spent in accordance with nondiscrimination requirements. Under any Federal program legislation which provides for periodic payments, which have already begun, such as under the State and Local Fiscal Assistance Act of 1972, the deferral would be of further funding. This Commission believes that deferral might be appropriate after an investigation of possible discriminatory practices and during the pendency of agency administrative proceedings to terminate assistance.[221] This Commission believes that it might also be appropriate during the pendency of an investigation itself, whenever a strong *prima facie* case of discrimination appeared established by a major review of the status of civil rights compliance by a recipient, performed by another Federal agency or by a State agency, or where a preliminary injunction had been granted against the recipient government in unrelated proceedings involving the same underlying program or activity.[222]

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[220] ORS wrote:

> We question the accuracy of this statement which appears contrary to Section 122 of the Revenue Sharing Act. That section states, in part, "under any program or activity funded in whole or in part, etc." The Act therefore uses the word *funded*, which is past tense, in regard to the *expenditure* of GRS funds. The first paragraph on /this page/ ...uses the future tense in regard to the expenditure of GRS funds. We believe the use of the future tense in inaccurate. Attachment 1 to 1975 Watt letter, *supra* note 14. /Emphasis in original./

This appears to be a spurious argument. If it were true, it would also apply to Title VI, which requires nondiscrimination in any program or activity "receiving" revenue sharing funds. It is clear, however, that deferral is permissable under Title VI. Department of Justice regulations provide for such fund deferral. 28 C.F.R. § 50.3.

[221] See Robinson v. Shultz, Civ. No. 74-248 (D.D.C. Apr. 4, 1974) (Interim Order).

The sanction of fund deferral exists under Title VI: it has been confirmed both by the Congress[223] and by the courts.[224] ORS, however, states that "recipient governments either have an inchoate right to their entitlements or they have no right to their entitlements."[225] It appears that so long as recipients meet administrative requirements such as submission of reports and assurances to ORS,[226] they are free to proceed with plans to spend GRS funds in violation of the Act's substantive prohibition of discrimination.[227] Not until after the funds have been obligated to a specific program or activity does ORS believe it has power to act to ensure funds are not spent in violation of the Act. This may well mean that funds will be spent before ORS is able to act to ensure compliance with the law.[228] While a purpose of the Act is to give recipients wide discretion in how they spend their funds, the scope of this discretion should not extend to include incipient violations of a prohibition which is grounded in constitutional notions of fundamental fairness, morality, and polity.

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[222] ORS has stated: "We believe the argument presented in /this/ paragraph... is incorrect even if ORS were a Title VI agency, which it is not." Attachment 2 to 1975 Watt letter, supra note 14.

The Fifth Amendment of the Constitution proscribes Federal support of discrimination. To be obedient to that oath, Federal officials must, where reasonable men could not disagree on the question whether the nondiscrimination provision of a law would be violated if the funds were spent, decline to provide the funds until the matter of incipient noncompliance is resolved. See also Robinson v. Shultz, supra note 221.

[223] In the 1960's, the Commissioner of Education of the Department of Health, Education, and Welfare (HEW) developed the practice of deferring funds to school districts which appeared not to be in compliance with the dictates of Brown v. Board of Education, 347 U.S. 483 (1954) and its progeny. As passed in 1964, Title VI contained no explicit provisions concerning deferral of funds. In 1966, however, Congress passed an amendment to Title VI which places a limit on the length of time funds could be deferred in educational programs. Thus, it is clear that the power to defer funds is implicit in Title VI. See 42 U.S.C. § 2000d-5 (1970).

[224] Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), aff'd, 480 F.2d 1159 (D.C. Cir. 1973); Board of Public Instruction of Palm Beach v. Cohen, 413 F.2d 1201 (5th Cir. 1969); Taylor v. Cohen, 405 F.2d 277, 280 (4th Cir. 1968).

[225] Attachment 2 to 1975 Watt letter, supra note 14.

[226] ORS' regulation provides for deferral of funding until the required assurances are received. 31 C.F.R. § 51.3(b).

In at least one case, ORS has not exercised its full authority to ensure that it does not award funds where they are to be placed in a discriminatory activity. This case was in Chicago. In 1972 the Law Enforcement Assistance Administrative (LEAA) received from four consultants a report on the employment practices of the Chicago Police Department.[229] The report was the product of a complaint filed against the Department by the Afro-American Patrolmen's League in June 1971. The findings of the report were adverse to the Department, and in August 1973, the Department of Justice filed suit in the Federal District Court for the Northern

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[227] ORS stated, "As /this/ paragraph...is written, it infers that ORS is shrinking from its responsibility, which is incorrect." Attachment 2 to 1975 Watt letter, supra note 14.

[228] The Federal Programs Task Force of the Leadership Conference on Civil Rights has recommended that ORS' regulations "provide for pregrant determinations of whether recipients are operating their programs on a nondiscriminatory basis," citing experience under Title VI as demonstrating that enforcement is much harder to secure after funds have been disbursed. Statement of William L. Taylor, Director, Center for National Policy Review, on behalf of member organizations of the Federal Programs Task Force of the Leadership Conference on Civil Rights, on the subject of general revenue sharing regulations, before a panel of the Office of Revenue Sharing of the U.S. Department of the Treasury, Mar. 26, 1973, at 5-6.

[229] The Chicago Police Department: An Evaluation of Personnel Practices, prepared for LEAA by consultants P. Whisehand, R. Hoffman, L. Sealy, and J. Boyer (1972). A second printing of this report appears in Revenue Sharing Hearings, supra note 39, at 279-420.

District of Illinois to end the prohibited practices.

On September 14, 1973, an administrative complaint was filed with ORS on behalf of the Afro-American Patrolmen's League, the National Association for the Advancement of Colored People of Chicago, and the Joint Civic Committee on Mexican-American Affairs against the City of Chicago, the City's Comptroller, Superintendent of Police, and members and the Secretary of the Civil Service Commission of Chicago.[230] The complaint requested action by the Department of the Treasury to end racially discriminatory practices in police employment and action to terminate funding to the City of Chicago. Complainants also requested a prompt investigation, the initiation of administrative proceedings against the city, and deferral of all entitlement payments during the pendency of the proceedings. The complainants alleged on information and belief that the total GRS allocation for Chicago during calendar year 1973 alone was $95.1 million, and that, of that sum, $69.68 million (74.31 percent of the total) was to go to the Police Department.

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230. See complaint submitted by William L. Taylor, Director, and Arthur M. Jefferson, Staff Attorney, Center for National Policy Review, Catholic University Law School, Washington, D.C. Attorneys for the Lawyers' Committee for Civil Rights Under Law were among those of counsel in the proceeding.

After an exchange of correspondence made clear that ORS would not defer funding,[231] even after it had investigated the Chicago Police Department and found discrimination to exist, the complainants filed suit in Federal district court in Washington to compel action by ORS. The court declared in April 1974 that ORS indeed has the power to defer funding pending completion of administrative proceedings to secure compliance.[232] ORS chose not to exercise this option: a month after the opinion was issued, ORS had not, to the knowledge of its Director, notified the Governor of Illinois or the Mayor of Chicago that continued noncompliance might result in deferral of further funding.[233] ORS has made clear that it will not defer Chicago's funds unless ordered to do so by a court of law.[234]

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[231] See, e.g., Complainants' Application for Continued Deferral of Funds and Memorandum in Support of Motion to Continue Deferral, Oct. 17, 1973; letter from Robert T. Murphy, Compliance Manager, Office of Revenue Sharing, Department of the Treasury, to William L. Taylor, Director, and Arthur M. Jefferson, Staff Attorney, Center for National Policy Review, Oct. 19, 1973; letter from William H. Sager, Chief Counsel, Office of Revenue Sharing, to William L. Taylor, Nov. 7, 1973; and Complainants' Brief in Support of Application for Deferral of Funds, Dec. 21, 1973.

[232] Robinson v. Shultz, Civ. No. 74-248, (D.D.C. Apr. 4, 1974) (Interim Order). The court held, however, that the power was discretionary, not mandatory, and did not order its exercise. Id.

[233] Robinson v. Shultz, Civil Action No. 74-248, Deposition of Graham W. Watt, Director , Office of Revenue Sharing, Department of the Treasury, May 3, 1974.

On December 18, 1974, after the Federal district court in Chicago had entered findings of fact showing discrimination in certain employment practices of the Chicago police department,[235] the Federal district court in the District of Columbia issued an order forbidding the Office of Revenue Sharing to provide any further GRS funds to Chicago until: (a) the city of Chicago becomes subject to a final court order in the employment discrimination litigation in the Federal district court in Chicago; (b) the city has formally assured ORS that it will comply in all respects with the final order; and (c) ORS files a report with the Washington court showing that it has monitored Chicago's implementation of steps to comply with the nondiscrimination requirement and that they were adequate.[236] Thus, it appeared that the quarterly payment of almost $20 million, due to be mailed to the City of Chicago on January 3, 1975 was withheld by the Office of Revenue Sharing.[237]

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[234] Id., see also testimony of Graham W. Watt, in Revenue Sharing Hearings, supra note 39, at 30. ~~It should~~ be noted that the Department of Justice did not seek a deferral of LEAA's funding, nor of ORS funds after the complaint had been amended in June of 1974.

ORS' handling of the Chicago complaint, including its decision to defer funding despite its own determination of discrimination, was the subject of discussion before a subcommittee of the Congress in early June 1974. At that time, one subcommittee member remarked ~~to ORS'~~ Director that:

> ...the posture you put yourself into is a very cautious, very restrained, and very inhibited exercise of this [ORS' civil rights] responsibility....if the administrator of the revenue sharing program does not indicate a vigorous, determined and positive attitude of his responsibility, he undermines the credibility of the program. Remarks by Sen Edmund Muskie, in Revenue Sharing Hearings, supra note 39, at 32.

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[235] United States v. City of Chicago, Civ. No. 73 C 2080, 8 EPD Para. 9785 (N.D. Ill. Nov. 7, 1974) (Interim Order).

[236] Robinson v. Shultz, Civ. No. 74-248, (D.C.C. Dec. 1974) (Interim Order).

[237] As of December 1974, Chicago had already received $184 million in GRS funds.

Chapter V

Other Matters

A. Allocation of Funds

One paramount civil rights problem raised by the State and Local Fiscal Assistance Act itself is that the financial assistance made possible under the Act may affect a broader range of State and local government activities than will the Act's requirement for nondiscrimination. State and local governments are granted wide discretion in how they can use GRS funds, allowing the governments to choose those programs or activities to be funded with assistance provided through revenue sharing and those to be funded by other sources. The use of GRS funds for a particular expenditure can free State and local funds for other uses. This type of allocation enables a State or local government to use its own funds for activities which might have a discriminatory impact,[238] such as housing and health care programs, and reserve GRS funds for less controversial activities or programs such as traffic safety and pollution abatement.[239]

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[238] For example, the Act would prohibit the use of entitlements for the construction of a highway in a discriminatory fashion, e.g., a highway improperly routed through a minority community, which would cause considerable disruption and fragmentation of that community and which by considering engineering and design standards and socioeconomic factors could be demonstrated to have been routed elsewhere. Nonetheless, the planned highway system would typically involve numerous separate and distinct projects (the Federal Aid Highway Act, as amended (23 U.S.C. § 101 (a)) defines a project as "an undertaking to construct a particular portion of a highway...." A State might try to avoid conflict with the State and Local Fiscal Assistance Act's proscription of discrimination in the use of GRS funds by using nonrevenue sharing funds for that portion of the road routed through the minority community and revenue sharing funds for less controversial portions.

This type of reallocation could enable recipients to circumvent a number of the Act's restrictions on the use of GRS funds including the prohibitions against local government's use of funds for non-priority expenditures and against use of funds to "match" the Federal share of certain grants.[240] Only in the instance of the restrictions on "matching" Federal aid, however, do ORS' regulations prohibit the allocation of GRS funds to circumvent the requirements of the Act.[241]

The Chief Counsel of ORS noted that this is because the State and Local Fiscal Assistance Act prohibits not only the direct but also the indirect use of entitlement funds to match Federal funds.[242] He believes since there is no comparable prohibition in the Act concerning the indirect use of GRS funds for discriminatory purposes, ORS regulation may not be expanded to include such a prohibition.[243] Thus, neither the Act nor its implementing regulation is viewed by ORS as providing much protection against discrimination in programs made possible by GRS funds but which are not funded directly with GRS funds.

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[239] The Comptroller General has expressed the opinion that:

> ...requirements of the Act applicable to direct uses of the funds apparently can be avoided either by (1) budgeting revenue sharing funds in a manner which will reduce potential compliance problems or (2) displacing funding sources. It is clear that a variety of restrictions can be imposed and enforced on the direct uses made of revenue sharing. However, unless identical requirements are imposed on all or a major part of a recipient's other revenues, the actual effectiveness of such restrictions is doubtful. Statement of Elmer B. Staats, Comptroller General of the United States, in Revenue Sharing Hearings, supra note 39, at 607.

[240] 31 U.S.C. §§ 1222, 1223 (Supp. III, 1973). These restrictions are discussed further on pp. 2-4 supra.

[241] 31 C.F.R. § 51.30 .

[242] Sager interview, supra note 40.

[243] Id.

A United States district court opinion indicates that reallocation of funds to a discriminatory activity for the purpose of circumventing the non-discrimination requirement may not be permissible. In Mathews v. Massell,[244] the district court did not allow reallocation of funds for the purpose of subverting the requirement that general revenue sharing funds be used by local governments only for priority expenditures. Illustrating its holding, the court stated:

> ...if defendants were to prevail on their arguments, other statutory restrictions placed on the use of Revenue Sharing funds would likewise become meaningless. This court cannot conclude that Congress intended for its prohibition against the use of the funds in a manner that discriminates on the basis of race, color, national origin or sex...to be so easily read out of the Act. [245]

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[244] 356 F. Supp. 291 (N.D. Ga. 1973). In Mathews v. Massell, the plaintiffs, citizens and taxpayers of the city of Atlanta, challenged Atlanta's plan to use a portion of the city's own funds made available by GRS funds to make a rebate to those with water and sewer accounts. The defendants apparently hoped to accomplish this by paying firemen's salaries with entitlement funds and then transferring money from a general fund originally intended for firemen's salaries to the city's water and sewer fund. The defendants contended that they fully satisfied the requirement of the Act by placing their entitlement funds in a trust account for payment of firemen's salaries, a priority use.

The court held that while the Act did not specifically impose any restrictions upon the use of legitimately freed-up funds, there is a difference between legitimately freed-up funds and those which are transferred from one account to another to avoid the requirement that funds be used by local governments for priority expenditures.

[245] Id. at 301.

Thus, it would appear that ORS' responsibility extends to ensuring that general revenue sharing funds are not obviously used to free funds for programs or activities which are violative of the intent of the nondiscrimination provision. At a minimum, when ORS receives a discrimination complaint against a State or local government program or activity which is not directly funded by entitlement funds, it should look to see if the program or activity was made possible with reallocated funds, and if so, it should review the circumstances of the reallocation.

It does not appear that ORS has regularly used its investigations to determine whether reallocations have taken place.[246] Moreover, it appears that it is too difficult to trace the impact of all GRS funds on a recipient jurisdiction.[247] ORS reports:

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[246] ORS, however, maintains that:

> One of the main purposes of the ORS Compliance visits in May and June of 1973 from the financial audit point of view, was to ascertain if it were possible to discover to which programs "freed-up" funds had been shifted. Attachment 2 to 1975 Watt letter, supra note 14.

It should be noted that it was not until January 1975 that ORS made known to this Commission that this was one of the purposes of its compliance visits. None of the materials printed by ORS concerning these visits (see section IVB, supra) create this impression and no questions used in the audits (see section IVC supra) were directed toward such a determination.

[247] Although it might be possible to trace reallocations of funds on a case by case basis, enabling ORS to investigate particular allegations, it appears that a broadscale investigation of the uses to which freed-up funds are put would be impracticable.

> It became readily apparent during two pilot compliance visits (Montgomery and Prince George's Counties, Maryland) that it was impossible as a practical matter to trace "freed-up" funds, especially after the first year of funding. Much of the impossibility is due to inflation and to a reduction in the funding of other Federal programs. [248]

One solution would be to recognize in future legislation[249] the fungibility of money, and the fact that allocation of any GRS funds has a budgetary effect--it frees up other funds, or it permits an avoidance of new taxes, a reduction in present taxes, an avoidance of any need for increased borrowing or deficit spending, or conceivably an actual rebate to taxpayers. Therefore, application of the Act's prohibitions to the concept of fungibility would mean that the entire budget of a recipient would be subject to the restrictions of the Act. In the area of civil rights, such application may be warranted: it appears to follow from the core notion underlying Title VI of the Civil Rights Act of 1964, that Federal dollars ought not contribute to discrimination.

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[248] Attachment 2 to 1975 Watt letter, supra note 14.

[249] Congress should consider in assessing the GRS program whether the possibilities for discrimination inherent in allocation of GRS and other funds have been exploited by recipient governments.

If a discriminatory program or activity receives funding through State or local dollars which become available because of an infusion of GRS funds, then such discrimination should be unlawful under the statutes and regulations governing GRS.[250]

B. "New" Money

In his February 4, 1971, message to the Congress on general revenue sharing, President Nixon stated that "all of this would be 'new' money--taken from the increases in our revenues which result from a growing economy. It would not require new taxes nor would it be transferred from existing programs."[251] Similar commitments had been made earlier, both in President Nixon's January 22, 1971, State of the Union Message[252] and in his January 29, 1971, Message to the Congress on the Fiscal Year 1972 Budget.[253]

An inference arising from Nixon administration statements regarding its fiscal proposals was that categorical grant aid would remain at then-current levels, pending the transition to any special revenue sharing programs which might be enacted. This would ensure that GRS funds would be available as an additive source of revenue for meeting State and local problems. The Nixon administration commitments were of special interest to minorities and women, because of their concern with federally assisted social programs. Subsequent developments in the area of budget cutbacks and impoundments, however, appear to have undermined the promise of "new money."

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[250] At least one group has already substantially made this recommendation. See Fleming-Purcell letter, supra note 160.

[251] Public Papers of Richard Nixon, supra note 28, at 117.

[252] Id. at 59.

[253] Id. at 83.

1. Budget Cutbacks

The fiscal year 1974 budget of the Federal Government, submitted to the Congress only a few months after passage of the State and Local Fiscal Assistance Act of 1972, proposed widespread domestic program cutbacks.[254] In one instance, the Nixon administration appeared to repudiate outright its promise that GRS would be new money. After declaring that no new funds were being proposed for the Office of Economic Opportunity (OEO), the Budget stated:

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[254] Office of Management and Budget, Budget of the United States Government, Fiscal Year 1974, Special Analyses 211-217. For an overview of domestic budget cutbacks, see Joint Center for Political Studies, 1 Focus No. 4 (Feb. 1973) at 3. A comparison in the budget itself of estimated Federal grant outlays to State and local governments for fiscal years 1973 and 1974 suggested that for the first time since fiscal year 1961 Federal aid outlays would decline not only as a percentage of total Federal outlays (domestic outlays and outlays for defense, space, and international programs) but of domestic Federal outlays and of total combined State and local government expenditures as well. (State and local expenditures are financed not only by Federal aid but by State and local revenues as well.) Moreover, the actual dollar value of Federal grant outlays to States was to decline from $45.0 to $44.8 billion.

> Effective July 1, 1973, new funding for Community Action agencies will be at the discretion of local communities. After more than seven years of existence, Community Action has had an adequate opportunity to demonstrate its value. In addition to private funds, State and local governments may, of course, use general and special revenue sharing funds for these purposes.... [255]

The budget cutbacks indeed threatened to end programs of interest to minorities and women.[256] City government estimates of anticipated losses due to budget cuts[257] in fiscal year 1974 as compared to funds

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255. Office of Management and Budget, Budget of the United States Government, Fiscal Year 1974 122.

256. J.G. Phillips, "Federal Budget Cuts Turn Mayors Against Administration Revenue Sharing Plans," 5 National Journal Reports 1099 (July 28, 1973). National Journal staff interviewed a total of 41 municipal government officials at a June 1973 annual meeting of the U.S. Conference of Mayors. The Mayor of Milwaukee regarded the budget cuts as a "gigantic doublecross" of the nation's poor. Id. at 1102.

In the summer of 1973 the Mayor of East St. Louis, Missouri, reported that:

> We're losing our housing program, our OEO programs, food stamps, and $600,000 in model cities. That general revenue sharing money is just a drop in the bucket. It doesn't even put us in the pink, let alone in the black. Id. at 1103.

257. Id. at 1104-05.

available in fiscal year 1973 ranged into the tens of millions of dollars.[258] Programs expected to be hurt included low-income housing, meals for low-income elderly persons, summer jobs for youth, and family health centers for the poor.[259] One organization of city officials has stated that "the deep cuts in the Budget[260] will affect vital city programs. These cuts will be felt first and sharpest by minority groups and the poor...."[261]

2. Impoundments[262]

Presidential impoundments of--i.e., refusals to spend--Federal funds both preceded and followed enactment of GRS and announcement of the fiscal year 1974 budget. An OMB listing submitted to the Congress on February 5, 1973, less than four months after GRS was enacted into law, showed 8.7

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[258] Id. at 1100-05.

[259] Id.

[260] Mayor Ben Boo of Duluth, Minnesota, while not believing that the Nixon administration had intentionally misled the Nation's mayors on the "new money" issue, reportedly called the timing of the budget cuts so soon after enactment of GRS "a real tragedy." Id. at 1102.

[261] National League of Cities/U.S. Conference of Mayors, The Federal Budget and the Cities, A Review of the President's 1974 Budget in Light of Urban Needs and National Priorities (February 1973).

[262] The question whether the President has power to impound GRS funds themselves, not discussed herein, is addressed in Stolz, Revenue Sharing: Legal and Policy Analysis, supra note 10, at 127-38.

billion in funds impounded from fiscal year 1973 appropriations as of January 29, 1973.[263]

Almost $1.5 billion was being withheld from the Department of Agriculture,[264] $181 million from the Department of Commerce,[265] $35 million from HEW,[266] $529 million from HUD,[267] and $482 million from the Department of the Interior (USDI). Moreover, $382 million was being impounded pending Congressional action on Nixon administration-proposed program rescissions.[268] Almost $100 million of this had been slated for HEW, for such things as food, drug, and product safety, Indian health services, Indian education, and higher education.[269]

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[263] 5 *National Journal Reports* 238 (Feb. 17, 1973), (table prepared from the OMB figures).

[264] *Id.* This included $158 million from the Department of Agriculture's food stamp program.

[265] *Id.* This included $17.9 million from the Office of Minority Business Enterprise for minority business development.

[266] *Id.* This included $4.6 million from HEW funds for Indian health facilities.

[267] *Id.* This include $400 million in grant funds for basic water and sewer facilities from HUD.

[268] 5 *National Journal Reports* 237. A proposed rescission is an administration request for Congressional approval of cancellation of funding for a specific program. The reported OMB practice is to withhold funds pending congressional action on a proposed rescission. *Id.*

[269] *Id.*

In 1973, as perhaps never before, impoundments were contested in the courts.[270] An end-of-the-year estimate put the number of suits at more than sixty.[271] Even the Office of Revenue Sharing, in a fall 1973 report of a spring 1973 study of approximately the 100 largest recipients of GRS funds, stated that:

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[270] Stolz, in Revenue Sharing: Legal and Policy Analysis, supra note 10, reports (at 209) that as of August 10, 1973, 37 suits involving the validity of spending controls were pending before Federal courts. In only 2 of these actions had a district court granted government motions to dismiss. The following laws were among those involved in the litigation: the Federal Aid Highway Act of 1956. 23 U.S.C. § 101 et seq.; the Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1281 et seq.; Title III of the National Defense Education Act, 20 U.S.C. §441; the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241(a) et seq.; the Vocational Education Act of 1963, 20 U.S.C. § 1241 et seq.; the Adult Education Act of 1966, 20 U.S.C. § 1201 et seq.; Library Services and Construction Act of 1970, 20 U.S.C. § 351 et seq.; the Nurses Training Act of 1971, 42 U.S.C. § 296(a); Comprehensive Health Manpower Act of 1971, Section 770, 42 U.S.C. § 295(f); the Community Mental Health Centers Act, 42 U.S.C. § 2688 et seq.; Economic Opportunity Act of 1964, Section 123 (Neighborhood Youth Corps Summer Program), 42 U.S.C. § 2740; Rural Electrification Loans, 7 U.S.C. § 701 et seq.; Emergency Agriculture Loans, 7 U.S.C. § 1981 et seq.; the Indian Education Act, P.L. 92-318; the Indian Health Services Act, P.L. 92-369; the Rural Environmental Assistance Program, 16 U.S.C. § 590g et seq.; the Federally Assisted Code Enforcement Program, 42 U.S.C. § 1452(b); the Special Supplemental Food Program, 42 U.S.C. § 1786; and Farmers' Home Administration Interest Credit Program, 42 U.S.C. §§ 1472 and 1485. Id. at 209-211. This recent history of impoundments of domestic aid programs doubtless contributed to the passage of the Congressional Budget and Impoundment Control Act, Pub. L. No. 93-344, July 12, 1974, 88 Stat. 297.

> In some states, revenue sharing receipts are insufficient to compensate anticipated reductions in Federal categorical grants, producing a presumptive net reduction in revenue for the states. 272

One major organization [illegible] local government officials, ostensibly in reply to findings that cities were spending only a small percentage of revenue sharing funds on social service programs, stated that:

> It has been argued that revenue sharing is a "disaster" for the urban poor since only a small percentage of the money is being allocated to social service-type programs. We do not take issue with the statistical finding. What we do question, however, is the basic assumption. It must be pointed out that city governments have not traditionally been involved in the administration of social services. This function is primarily performed by county and state governments....If a city does not administer social service programs, it is not surprising that its revenue sharing funds are not being appropriated to this category. 273

The statement would serve equally well as a defense by city governments for not using GRS funds to fill gaps in services created by Federal budget cutbacks or impoundments.

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271. Washington Post, Dec. 13, 1973, at C2.

272. Compliance Report, supra note 109, at 11.

273. Statement on behalf of the National League of Cities and the U.S. Conference of Mayors, before the Advisory Commission on Intergovernmental Relations, Oct. 10, 1973, at 3.

It is probably too early to assess the net effects of budget cutbacks and impoundments on allocations of GRS funds.[274] Although the degree of success enjoyed by the poor, minorities, and women, as interest groups, in influencing their governments to fill gaps in funding created by actions at the Federal Executive level is not known, at the least it is clear that the apparent failure to fulfill the "new money" promise has caused considerable anxiety and perhaps, in some quarters, despair.

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[274] It has been reported that, according to officials in 101 of 250 local jurisdictions surveyed by the General Accounting Office, reductions or possible reductions in the amount of aid received under other Federal assistance programs influenced GRS use decisions. Revenue Sharing Hearings, supra note 39, at 604.

Richard P. Nathan, Senior Fellow of the Brookings Institute, has suggested that the ability of groups or organizations monitoring the GRS program to make laboratory-condition assessments of spending decisions has been undermined by the "pincer" effect of budget cutbacks and impoundments. Advisory Commission on Intergovernmental Relations (ACIR), ACIR Revenue Sharing Hearing III (May 1974), reprinted in ACIR, General Revenue Sharing: An ACIR Re-evaluation at A26 (October 1974). This publication includes findings and policy recommendations adopted by ACIR in September 1974. With regard to civil rights, ACIR recommended that ORS:

> ...conclude arrangements with appropriate existing Federal, state, and local government agencies to carry out the civil rights responsibilities under the revenue sharing act. Id. at 74.

C. Census Undercounts

Population figures, derived from data collected for the decennial census of the United States, are used as an element in computing the entitlements of units of government under the State and Local Fiscal Assistance Act of 1972.[275] These data represent a 2.5 percent undercount of the entire United States population. The undercount was more severe for minority groups: fully 1.87 million blacks--7.7 percent of the black population--were not counted.[276] The Bureau reports that there is most likely a higher undercount rate in cities with large black populations, such as Washington, D.C.[277] In addition, research on the Bureau of the

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[275] Funds are allocated to States on the basis of whichever of two formulas yields the higher payment. The first formula, developed by the House of Representatives, takes into account five factors: population, urbanized population, population weighted by the relative per capita income of the United States compared to the State per capita income, general tax effort of the State and its localities, and State individual income tax collections. The first three factors allow for need. The final two factors are "incentive" factors, intended to encourage States and localities to meet their own revenue needs. The second formula, developed by the Senate, is based on population weighted by inverse relative income levels (thus, the lower the income, the greater the aid), further weighted by general tax effort. General Explanation, supra note 4, at 10-13. See also Office of Revenue Sharing, Department of the Treasury, What is General Revenue Sharing? 3-4 (August 1973).

[276] The Bureau of the Census estimates that 5.3 million Americans were not counted by the 1970 census. Of that number, 3.45 million were white (including persons of Spanish speaking background)--1.9 percent of the total white population. See J. Siegel, U.S. Bureau of the Census, Estimates of Coverage of the Population by Sex, Race, and Age in the 1970 Census, paper presented at the annual meeting of Population Association of America, New Orleans, La., Apr. 26, 1973.

[277] Id.

Census counts of persons of Spanish speaking background leads to the expectation that there was a high undercount in cities with large populations of Spanish speaking background, such as New York, Los Angeles, Chicago, San Antonio, and El Paso.[278] Native Americans may also have been undercounted.[279] There has been a great deal of public pressure on the Department of the Treasury to correct these undercounts when calculating recipient entitlements.[280]

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[278] Spanish origin population estimates exceeding the Bureau of the Census count have been made by many Spanish origin organizations and individuals, including the Mexican American Population Commission of California, the Mexican American Legal Defense and Educational Fund, the Migration Division of the Department of Labor of the Commonwealth of Puerto Rico, and staff members at the City University of New York. It seems reasonable to speculate that the undercount of persons of Spanish origin is proportionately higher than that measured by the Bureau of the Census for whites and is either equal to or greater than that for blacks. Factors such as poor mail delivery, illiteracy, and overcrowded living conditions contribute to an undercount, and such factors are often prevalent in poor and minority neighborhoods, including Spanish speaking communities. In addition, the Spanish speaking person's lack of familiarity with English may contribute to failure to complete census forms. These factors support the hypothesis that undercounts have occurred in cities with large Spanish speaking background populations. U.S. Commission on Civil Rights, *Counting the Forgotten: The 1970 Census Count of Persons of Spanish Speaking Background in the United States* (April 1974).

[279] *Id.* at 10.

Although the Bureau of the Census has estimated the undercount in the 1970 Census, the figure is nationwide and not apportioned geographically.[281] Thus, the Bureau is not able to provide ORS with revised population estimates, by locality, which would compensate for the undercounts. As a result, cities with large minority populations may be receiving smaller entitlements than their populations warrant.[282]

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[280] See, e.g., letter from Eddie N. Williams, Director, Joint Center for Political Studies, to George P. Shultz, Secretary of the Treasury, May 3, 1973; letter from U.S. Rep. Charles B. Rangel to Secretary Shultz, May 10, 1973; letter from Ed Marciniak, President, Institute of Urban Life, to Senators Charles Percy and Adlai E. Stevenson, III, May 11, 1973; letter from Rev. Jesse L. Jackson, President, People United to Save Humanity (PUSH), to Secretary Shultz, May 21, 1973; letter from William S. Hart, Sr., Mayor of East Orange, New Jersey, and President of the National Black Caucus of Local Elected Officials (NBC/LEO), Richard G. Hatcher, Mayor of Gary, Indiana, and Past President of NBC/LEO, and Robert B. Blackwell, Mayor of Highland Park, Michigan, and Past President of NBC/LEO, to Secretary Shultz, May 31, 1973; and letter from James Robertson and Robert R. Morris, of the firm of Wilmer, Cutler & Pickering, Attorneys for the City of Newark, N.J., to Secretary Shultz, Nov. 26, 1973.

See also the following news stories relating to some of this correspondence and to the issue of undercount adjustments in general: New York Times, "Black Aid Appeal Linked to Census," May 4, 1973, at 15, col. 1; New York Times, "Agency Mapping Census Data Plea," June 27, 1973, at 24, col. 3; and New York Times, "Cities Ask Funds, Assailing Census," Dec. 9, 1973, at 46, col. 1. The U.S. Conference of Mayors, at a June 1973 meeting in San Francisco, passed a resolution sponsored by the National Black Caucus of Local Elected Officials, asking correction for undercounts in determining GRS entitlements. A similar resolution was passed in December 1973 by the National League of Cities.

[281] An official from the Bureau of the Census noted:

> ...estimates of the coverage of the population of geographic subdivisions of the United States in 1970, similar in reliability and scope to those presented for the United States, cannot be prepared. Siegel, supra note 276 at 24. See also letter from George P. Shultz, Secretary of the Treasury, to Rep. Charles B. Rangel, June 4, 1974.

The State and Local Fiscal Assistance Act gives the Secretary of the Treasury authority to adjust the data elements used in GRS entitlement formulas in order to correct these undercounts, and in so doing to use data other than Census data, including estimates.[283] Nevertheless, the Department of the Treasury and ORS have indicated no remedial action will be taken, primarily because of the perceived lack of any way to arrive at correct estimates of the number of GRS

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282. It should be noted that any adjustments made to correct for undercounts would not enlarge the total "pool" of funds available under the Act; rather, the funds already appropriated by the Congress would simply be reallocated among the recipients. In addition, ORS aserts that under the Act, not all localities with an undercount would necessarily receive increased amounts with corrected population figures, because of what is called the "145 percent contraints." Statement of Graham W. Watt, Director, Office of Revenue Sharing, in Revenue Sharing Hearings supra note 39, at 24. The Act provides that the "per capita amount allocated to any county or unit of local government ....shall not be....more than 145 percent, of two-thirds of the amount allocated to the States /under the formulas discussed in note 275 supra/ divided by the population of the State." 31 U.S.C. § 1227(b)(6)(B) (Supp. III, 1973).

283. The Act provides:

> Where the Secretary determines that the data provided by the Bureau of the Census or the Department of Commerce are not current enough or are not comprehensive enough to provide for equitable allocations, he may use such additional data (including data based on estimates)....
> 31 U.S.C. § 1228(a)(B) (Supp. III, 1973).

See also, ORS regulations, at 31 C.F.R. § 51.20(b)(3).

recipients.[284] In addition, the Department of the Treasury contends that in any event, the population figures do not heavily influence the actual allocations.[285]

The issue of Census undercounts appears to involve two questions, one legal, the other technical. The legal question is whether the Secretary of the Treasury has an affirmative obligation to correct undercounts.[286] The technical question is whether a methodology can be devised for making the appropriate undercount adjustments.[287] As of fall 1974

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[284] See, e.g., letter from Karen Spaight, Office of Revenue Sharing, Department of the Treasury to Eddie N. Williams, Director, Joint Center for Political Studies, June 23, 1973; letter from George P. Shultz, Secretary of the Treasury, to Rep. Charles B. Rangel, June 4, 1973; letter from Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, to William S. Hart, Sr., Mayor of East Orange, New Jersey, and President of the National Black Caucus of Local Elected Officials (NBC/LEO), Richard G. Hatcher, Mayor of Gary, Indiana, and Past President of NBC/LEO, and Robert B. Blackwell, Mayor of Highland Park, Michigan, and Past President of NBC/LEO, June 15, 1973; and letter from Director Watt, to James Robertson and Robert Morris, Wilmer, Cutler & Pickering, Attorneys for Newark, New Jersey.

[285] Id. Contrary to the Department of the Treasury's contention, a recent study of selected cities and counties in New Jersey and Virginia has calculated that if undercounts were corrected, Newark would receive $436,000 more annually than it now does; Norfolk, $248,000 more; and Richmond, $228,000 more. Robert P. Strauss and Peter B. Harkins, The 1970 Census Undercount and Revenue Sharing: Effect on Allocation in New Jersey and Virginia (a study commissioned by the Joint Center for Political Studies, Washington, D.C., 1974). The National Urban League has projected losses for major cities attributable to undercounts, over the five-year life of the program. New York, for example, would lose $6.7 million; Chicago, $2.5 million; Los Angeles, $1.1 million; and Washington, $1.5 million. National Clearinghouse on Revenue Sharing, Revenue Sharing Clearinghouse, July/August 1974 at 12.

[286] Attorneys for the City of Newark, N.J., requested administrative action to correct population figures for Newark and indicated their view that § 109(a)(7)(B) of the Act "requires" appropriate action. The letter implied an intent to pursue legal remedies if no administrative action were taken within 30 days of the date of the letter. Robertson and Morris letter, supra note 280. The Lawyer's Committee for Civil Rights Under Law is of counsel in the administrative filing. A civil suit was thereafter filed, and was still pending as of September 1974.

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287. It appears that at least at the State level, it is both feasible and desirable to make corrections for the undercounts. In 1974, under commission from ORS, the Stanford Research Institute (SRI) conducted a study of GRS data. SRI found that:

> ...a higher level of equality of allocations can be achieved through the use of more accurate and more current data in the computation of allocation amounts.... Stanford Research Institute, General Revenue Sharing Data Study, Vol. I, Executive Summary iii (August 1975).

SRI also found that:

> Equity of allocations to the 50 States and the District of Columbia can be increased by adjusting at the State level for underenumeration, using the national age/sex/race underenumeration rates prepared by the Bureau of the Census. Id.

SRI recommended appropriate corrections at the State level. Id.

neither the legal nor the technical question seemed resolved.[288]

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288. ORS stated:

> In our opinion, the technical question *has* been resolved. We believe that no adequate methodology exists for making underenumeration adjustments to population by *locality*. In this connection, we refer you to (note 281 *supra*) and to the Stanford Research Institute *General Revenue Data Study* (*sic*), August 1974, Vol. I p. 38. Attachment 1 to 1975 Watt letter, *supra* note 14. (Emphasis added.)

It is true that SRI reported that no feasible short-range recommendations for adjusting for underenumeration below the State level were found that would provide complete equity. It stated that a compromise procedure, using the national underenumeration rates for jurisdictions over 50,000 population and the average 2.5 percent rate for all other jurisdictions, could be developed, but recommended against use of this compromise procedure "at this time." *Id*. at 38.

It should be noted, however, that two employees of SRI, in a paper included as an Appendix to the data study stated that ORS "should seriously consider the possibility of adjusting country area, municipality, and place populations for the governmental jurisdictions with population of 50,000 or more." Stanford Research Institute, *General Revenue Sharing Data Study, Vol. III, Evaluation of Current and Alternative Data Sources*, Appendix D "Underenumeration and the General Revenue Sharing Allocation Process," at D-28. They also stated:

> Ignoring the problem of underenumeration, or treating it as irresolvable because there is no strict solution to distributing the uncounted population, means that the governments whose populations are counted less well than others may not receive their equitable shares. *Id.* at D-29.

D. Coordination[289]

1. Department of Justice (DOJ)

The State and Local Fiscal Assistance Act provides that when a failure of compliance with the Act's prohibition against discrimination is referred by ORS to the Attorney General, he or she may bring a civil action for relief, including injunctive relief, in any appropriate United States district court.[290] It was under this authority that ORS forwarded the complaint concerning the Chicago police department to DOJ in May 1974.[291]

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[289] In January 1975 ORS wrote to the Commission:

> I am personally encouraged by the increasing levels of activity and constructive accomplishment resulting from the increasing understanding and involvement of local and state chapters of the national civil rights organizations. The leadership of the NAACP in particular has been most encouraging in this area.
>
> I hope that the Civil Rights Commission, with its accumulated knowledge of opportunities as well as obstacles to achieving civil rights goals, and its nationwide responsibility, will be able to join with the Office of Revenue Sharing so that together we may move more rapidly toward the goals of eliminating patterns and practices of discrimination in employment as well as in services and benefits in state and local government programs.

In the same letter ORS also wrote:

> We are near the point of executing formal cooperation agreements with HEW, HUD and the Justice Department. In the meanwhile, we have been working closely with the Justice Department, Civil Rights Division in a variety of areas. They are assisting us in conducting joint investigations in our present effort to develop a nationwide representative sample of actual civil rights practices in state and local government. Also, our forthcoming regulations on deferral of funds can be expected to lead to accelerated adoption of consent decrees and affirmative action programs by state and local governments.
>
> Letter from Graham W. Watt, Director, Office of Revenue Sharing, Department of the Treasury, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights, January 20, 1975 [hereinafter referred to as 1975 Watt letter (2)].

ORS and DOJ have other areas of common interest as well. For example, the Act allows the Attorney General to bring a civil suit whenever he or she "has reason to believe that a State government or unit of local government is engaged in a pattern or practice in violation of [the prohibition of discrimination]."[292] In March 1974, pursuant to this authority, the Federal Programs Section of the Civil Rights Division of the Department of Justice[293] began to conduct routine compliance reviews of a number of city government recipients of GRS.[294]

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[290] 31 U.S.C. § 1242(c) (Supp. III, 1973).

[291] Telephone interview with Robert N. Dempsey, Chief, Federal Programs Section, Civil Rights Division, Department of Justice, Dec. 20, 1974. As of December 1974, this was the only official referral from ORS to DOJ. Id. The Chicago complaint is discussed on pp. 89-93 supra.

[292] 31 U.S.C. § 1242(b) (Supp. III, 1973). Moreover, Title IX of the Civil Rights Act of 1964, as amended, allows the Department of Justice to intervene in any Federal court action seeking relief from the denial of equal protection of the laws under the 14th amendment to the Constitution on account of race, color, religion, sex, or national origin. 42 U.S.C. § 2000h-2 (Supp. II, 1972). Thus, DOJ might be suing a state or local government, either as plaintiff under the State and Local Fiscal Assistance Act or as intervenor under some other law at the same time as that agency or office is under investigation by ORS with regard to revenue sharing funds.

As of mid-December 1974, the Federal Programs Section of DOJ had completed 21 compliance reviews. As a result of one of these, the

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[293] The Federal Programs Section, formerly the Title VI Section, is discussed in detail in The Federal Civil Rights Enforcement Effort--1974, Vol. 5, ch. 1, (in preparation). Although the number of staff people involved in this effort varied from time to time, there have been as many as ten professional employees working on this project.

[294] Dempsey interview, *supra* note 291. The review staff considered questions of discrimination both in employment and in provision of services. Two strata of cities were selected for reviews: those of population between 25,000 and 49,999 and those of population between 50,000 and 100,000. The Federal Programs Section's procedure in conducting these reviews, is as follows: a letter is sent to the city to be visited, advising it of the plan to visit, and requesting the appointment of an official to serve as liaison between the city and DOJ and to assist in gathering information. Teams of 2 or 3 people visit the city for about two and one half days, during which time any necessary visual surveys (e.g., of neighborhoods to detect disparate provision of services) are conducted and interviews are held with city officials and representatives of minority communities. The team then returns to Washington to assess the information gathered. If from information gathered initially it appears there may be possible noncompliance, but additional information is needed in order to resolve the matter one way or the other, a second visit is scheduled.

Department of Justice filed suit against the city of Tallahassee, Florida, alleging employment discrimination in a number of city agencies under Title VII and under the State and Local Fiscal Assistance Act.[295]

In eight or nine other cases, it appeared there may be problems,[296] generally in the area of employment;[297] in one case, there were clear problems in provision of municipal services to blacks. In about 10 other cases, preliminary indications are that there are no problems of noncompliance and one other review has been closed out entirely as no problems were found.[298]

Clearly, these areas of common interest indicate a need for coordination between DOJ and ORS. For example, both should agree upon what constitutes compliance with the Act so that there is a uniform standard for compliance for State and local governments.[299] Both should also agree upon standards for investigation so that in the event that ORS finds it necessary to refer a case to DOJ for civil action, DOJ will be able to rely upon the ORS investigation. Similarly, the two agencies should agree as to the circumstances which will lead ORS to refer to DOJ the case of a noncomplying recipient instead of proceeding with administrative enforcement action.

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[295] United States v. City of Tallahassee, Civ. Action No. TCA 74-209 (filed N.D. Fla., Dec. 13, 1974). As of December 1974, this was the only legal filing resulting from the DOJ compliance review effort in the area of general revenue sharing.

[296] The chief of the Federal Programs Dection noted that no final decisions had been made in these eight or nine cases. Dempsey interview, supra note 291.

[297] Three or four of the employment discrimination cases concerned persons of Spanish speaking background. Id.

[298] Id.

[299] There have been allegations that in the course of reviewing recipient governments, ORS' standards for compliance have been lower than those suggested by the Department of Justice when reviewing the same governments and that the diverging standards have caused confusion on the part of the governments. Sklar interview, supra note 136.

There is no formal agreement at all between the two agencies.[300] ORS and the Department of Justice are coordinating their activities only under a draft agreement, which does not address most of these issues but is designed primarily to avoid overlap in their activities.[301] Under this arrangement, ORS has agreed to stay out of areas which the Department of Justice is investigating.[302] The draft was written by the Department of Justice, which initiated the idea of an agreement between the two agencies. In mid-December 1974, the draft was before ORS for a decision as to its formal adoption.[303]

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300. Even so, DOJ and ORS have worked cooperatively in some areas. Early in the program, DOJ staff accompanied ORS staff to investigate complaints regarding Beaumont, Texas, and Mobile, Alabama. In one other matter, involving a city law enforcement agency, DOJ and ORS worked together to resolve a discrimination issue. Dempsey interview, supra note 291.

301. 1974 Murphy and Steen interview, supra note 44. Commission staff asked to view a copy of this draft agreement. Dr. Murphy stated that while he had no objection to this, he could not provide it to Commission staff as it would be more appropriately obtained from the Department of Justice. Department of Justice officials declined to give this agreement to Commission staff.

302. Id.

303. Dempsey interview, supra note 291.

DOJ has been instructed to provide direction to other Federal agencies in their enforcement of Title VI, by Executive Order 11764.[304] It thus may have the authority to review the compliance activities of ORS to ensure that they meet Federal standards for Title VI enforcement. As of December 1974, DOJ had not yet reviewed ORS, however, because the relation of this Executive Order to GRS was under discussion within the Department of Justice.[305]

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304. Exec. Order No. 11764, 39 Fed. Reg. 2575 (1974) requires the Attorney General to prescribe "standards and procedures regarding implementation of Title VI...." It directs the Attorney General to assist Federal agencies in "accomplishing effective implementation" of that Title, and permits her or him to adopt such rules and regulations as are necessary in this regard. All Federal agencies are directed to cooperate with the Attorney General in carrying out the functions of the Executive order.

305. Dempsey interview, supra note 291. DOJ would prefer to have clearer authority for the conduct of such a review than appears to exist under Executive Order 11764, which does not specifically refer to GRS.

2. Equal Employment Opportunity Commission (EEOC)

On October 11, 1974, ORS and the Equal Employment Opportunity Commission[306] entered into an agreement "to establish a joint working relationship designed to enable both agencies to resolve complaints of employment discrimination against public employers and their contractors.[307] The agreement provides the following:

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[306] ORS stated:

> Our cooperation agreement with the Equal Employment Opportunity Commission is a recent and important cooperative undertaking. As you know, EEOC was given responsibility in 1972 for employment practices in the state and local government sector. EEOC jurisdiction extends to perhaps 10,000 state and local governments. Also in 1972, the revenue sharing Act applied broad nondiscrimination prohibitions to all 38,000 local and state governments both in employment and in services and benefits when revenue sharing funds are involved. Further, since EEOC has field staff and reported information for many governments, and since the Office of Revenue Sharing has both funds involved and administrative sanctions available, the potential of a concerted effort becomes apparent. 1975 Watt letter (2), supra note 289.

[307] Memorandum of Agreement Between the Office of Revenue Sharing and the Equal Employment Opportunity Commission, signed by John H. Powell, Jr., Chairman, EEOC, and Graham W. Watt, Director, ORS, Oct. 11, 1974, and Attachment A, EEOC's Data Sharing Agreement Between EEOC and ORS, Oct. 11, 1974. In fiscal year 1973 a total of 3,874 charges of employment discrimination were filed under Title VII with the EEOC against State and local government employers; in fiscal year 1974, 5,186 such charges were filed. Telephone interview with Anne Marshall, Public Information Specialist, Office of Public Affairs, Equal Employment Opportunity Commission, Dec. 20, 1974.

--EEOC will upon request furnish ORS any information obtained by EEOC pursuant to Section 709(c) of the Civil Rights Act of 1964, as amended.[308]

--EEOC will routinely furnish copies of Letters of Determination[309] and Decisions[310] involving employers in revenue sharing funded activities to ORS.[311]

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308. This information, which must be compiled annually by employers, including State and local governments, includes data on the race, ethnicity, and sex of all employees and new hires by job category (e.g., separately for officials and administrators, professionals, technicians, service-maintenance). Employers having 100 or more employees must report this information to EEOC annually; employers with between 15 and 99 employees must compile such information and have it available for a period of three years. In addition, a rotating sample of employers having between 15 and 99 employees will be required each year to submit the employment data to the EEOC. See, for example Equal Employment Opportunity Commission, EEOC Form 164, State and Local Government Information (EEO-4). Instruction Booklet (1974). Under the ORS-EEOC agreement, ORS will preserve the confidentiality of this information. Although EEOC will furnish requested information free of cost, insofar as is possible, ORS will pay any cost incurred in filling a specific request.

309. Where an EEOC investigation finds facts analogous to those in a case previously decided by EEOC, a Letter of Determination is sent from an EEOC district director to the respondent and the charging party, citing the relevant facts and issues in the case and stating EEOC's determination as to whether there is reasonable cause to believe the charge is true.

310. In cases in which there is no EEOC precedent concerning the facts found by an EEOC district office investigation, the Commissioners render a Decision as to whether there is reasonable cause to believe the charge is true.

311. Memorandum of Agreement, supra note 307.

--Upon receipt of a Letter of Determination or a Decision indicating that EEOC has found probable cause to believe that discrimination exists in a GRS-funded activity, the Director of ORS will proceed to seek to secure compliance, in accordance with ORS' regulations.[312]

Both ORS and EEOC should be commended for the considerable efforts necessary to achieve the agreement, but the agreement is only the first stage in ORS-EEOC relations. A major omission from the agreement is the need to agree on standards for investigation and resolution.

The two agencies were in mid-December 1974 discussing implementation of the agreement.[313] ORS expects that it will work with EEOC on specific complaints in the following way: when EEOC makes a determination of noncompliance and is ready to conciliate with the charged party, it will ask and learn from ORS whether GRS funds are involved. ORS will then issue a notice of noncompliance to the chief executive officer of the recipient government concerned, requesting a response within a set time limit, not to exceed 60 days. ORS and EEOC will attempt joint conciliation of the matter. Upon failure to conciliate, ORS will proceed administratively against the respondent.[314]

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[312] If the Director of ORS finds that information furnished is insufficient to enable him or her to make a determination, the Director must then send a letter to the chief executive officer of the jurisdiction in question, requesting a response to the Commission's findings within 15 days. Memorandum of Agreement, supra note 307.

[313] The Director of EEOC's Office of Federal Liaison has met with officials of the Office of Revenue Sharing to discuss implementation of the agreement. The Director of the Office of Federal Liaison stated that implementation will involve five areas under consideration as of early 1975. These are: (1) merging the data bases of the two agencies, (2) data analysis, (3) ORS action upon receipt of Letters of Determination and Decisions, (4) impact upon State and local antidiscrimination agencies--assuring that a larger amount of GRS funds are used at the State level for State and local civil rights enforcement and agreements with State fair employment practice commissions on civil rights auditing in the area of employment, and (5) developing a publication for use by GRS recipients which will provide information on affirmative action plans for employment in State and local governments. Policy discussions on data analysis had occurred as of late January 1975. The objective contemplated by EEOC is the development of statistical tools and an analytical system for use in enforcement of nondiscrimination in employment by ORS, EEOC, and the Department of Justice. Telephone interview with Peter Robertson, Director, Office of Federal Liaison, Equal Employment Opportunity Commission, Jan. 24, 1975.

It is too early to tell to what extent the agreement will result in the use of EEOC data to determine minority and female employment levels in GRS-funded programs. Some combination of such factors as number of employees, the amount of GRS dollars involved, and the degree of disproportion between such population figures as are available for minorities and women and actual employment of them might serve as criteria for selection of GRS recipients in which ORS' interest should be of high priority, but it is clear that as of December 1974, such analysis was not being made on a regular basis. By that time, ORS had made several requests for public employment information from EEOC, but these were on a case by case basis and not for broadscale analysis.[315] Moreover, ORS officials, when asked whether such analysis would be possible under the then-forthcoming agreement, stated that they did not know what analyses EEOC had been doing of the public employment data it collects.[316]

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[314] 1974 Steen telephone interview, supra note 48. An implementation agreement was expected by ORS to be finalized near the beginning of 1975. Id.

3. Title VI Agencies

GRS funds may be used in a wide variety of programs or activities. For this reason, it is possible that they will be used in a program or activity which is already federally assisted and thus subject to the provisions of Title VI. In such cases, any instance of noncompliance with Title VI would also implicate GRS' prohibition of discrimination.[317] Thus, there may be areas of concern mutual to both ORS and Federal Title VI agencies, e.g., the Departments of Transportation,

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[315] Id.

[316] 1974 Murphy and Steen interview, supra note 44.

[317] The reverse is not true, because Title VI does not cover sex and provides only limited coverage of employment discrimination. See pp. 37-39 supra.

Housing and Urban Development, or Health, Education, and Welfare.[318] For example, it should be a matter of interagency interest that consistent standards of compliance are applied to avoid conflicting determinations or resolutions. Coordination could also avoid duplication of Federal agency effort.

Through interagency agreements, Title VI agencies and ORS could coordinate such matters as standards for compliance, routine exchange of information regarding noncompliance, the conditions of negotiated resolutions which would be satisfactory to agencies other than the lead agency, the circumstances under which cases would be referred to the Department of Justice for civil suit, and responsibilities fo monitoring to ensure implementation of any resolution.

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318. In addition to the agencies discussed in this section on Interagency Coordination, other agencies are given responsibility under the Act. For example, the Act directs the Comptroller General to make such reviews of the work of the Secretary and of State and local governments as may be necessary for the Congress to evaluate compliance and operations under the Act. 31 U.S.C. § 1243(c)(2) (Supp. III, 1973). The Comptroller General is the head of the General Accounting Office (GAO), an independent, nonpolitical agency of the legislative branch, which was created by the Budget and Accounting Act, 1921, 31 U.S.C. § 41 (1970). The prime purposes of the GAO are to: (1) assist the Congress to carry out its legislative and oversight responsibilities; (2) carry out legal, accounting, auditing, and claims settlement functions with respect to Federal Government programs and operations as assigned by the Congress; and (3) make recommendations designed to make Government operations more efficient and effective. The State and Local Fiscal Assistance Act also assigns to the Secretary of Labor responsibility for making prevailing wage determinations for application to wages of laborers and mechanics on construction projects, 25 percent or more of which are paid with GRS funds. See 31 U.S.C. § 1243(a)(6) (Supp. III, 1973).

Moreover, although the Act does not assign specific functions to the Department of Commerce (DOC), input data in such areas as population and income, necessary for computing entitlements, are provided by DOC, principally through its Bureau of the Census.

ORS should also be concerned to coordinate compliance efforts, because monitoring compliance with the civil rights provisions of the Act requires a large civil rights staff with expertise in a great number of areas, including housing, employment, education, and health and social services. ORS does not itself have a sufficiently large civil rights staff to carry out its responsibilities in these areas.[319] Thus, even where no other Federal agency has funded a program or activity which is in apparent noncompliance with GRS' prohibition of discrimination, ORS should feel a great interest in borrowing other agency expertise, whenever possible.

Although formal agreements with other agencies ought to have been concluded soon after passage of the State and Local Fiscal Assistance Act of 1972,[320] as of October 1974 this had not been done. ORS' regulation plainly contemplates such agreements. ORS did have some contact with other Federal agencies, but this has been largely _ad_ _hoc_.[321]

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319. See Section II supra, "Organization and Staffing."

320. Under ORS' regulation the Secretary of the Treasury may:

> ...from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of this section...including the achievement of effective coordination within the executive branch in the implementation of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). 31 C.F.R. § 51.32(g).

321. These agencies included the Department of Housing and Urban Development, the Law Enforcement Assistance Administration of the Department of Justice, and the Department of Health, Education, and Welfare. 1974 Murphy and Steen interview, supra note 44 .

In September 1973, ORS indicated that "preliminary contacts" had been made with agencies having Title VI enforcement responsibilities, that interagency agreements were a high priority with ORS, and that such agreements might contain "standard" items of accord, e.g., exchange of information.[322] One fact which ORS stated was retarding any agreements, was that it did not want to enter into agreements with other agencies which were doing a "bad" job.[323] Yet ORS has not sought information about Federal agencies which are charged with the responsibility for evaluating their effectiveness. As of December 1974, it had requested no assessments of Title VI agency performance from the Department of Justice[324] or from this Commission.

4. State and Local Human Rights Agencies

In the event that discrimination has been identified in the use of revenue sharing funds by a State, both the Act and the interim regulations direct the Secretary of the Treasury to notify the Governor of the State and request that he or she secure compliance. In the case of such a violation by a local government, the Secretary is to inform the Governor of the State in which the local government is located of the noncompliance and to request that he or she secure compliance. Direct contact between the Secretary of the Treasury and the noncomplying local government is not required.

State and local human rights agencies could play an important role in the enforcement of the GRS nondiscrimination requirement. Federal civil rights requirements, no matter how comprehensive, are more likely to prove sufficient to provide the level of protection that is necessary to ensure that the revenue sharing funds are expended in a nondiscriminatory manner if State and local agencies play a key role in the enforcement program. Furthermore, States and localities must be required to demonstrate that they, as recipients of large unrestricted amounts of Federal money, can provide the type of protection which will ensure the basic civil rights of all their citizens.[325]

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[322] 1973 Murphy interview, supra note 124.

[323] Id.

[324] Dempsey interview, supra note 291.

ORS has recognized the need for these agencies' involvement:

> Now that 34 states have executed formal audit agreements with us providing for audits of more than 15,000 local governments - which audits include a significant civil rights component - we are proceeding with our program to establish similar cooperation agreements with states having qualified human or civil rights agencies. We expect these agreements to facilitate prompt action to remedy conditions of discrimination, whether found by state or by federal investigators.[326]

Currently, few States and local governments could sustain the burden of participating in a meaningful way in ORS' enforcement program. At least as late as the early 1970's the majority of localities and more than a dozen States had no civil rights laws and, in fact, the civil rights laws of most States and localities that have enacted them are severely wanting in terms of coverage and available

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325. The need for State and local human rights agencies to play a role in general revenue sharing is discussed in the Commission's position paper on general revenue sharing, U.S. Commission on Civil Rights, "Revenue Sharing Program -- Minimum Civil Rights Requirements" (1971).

326. 1975 Watt letter (2), _supra_ note 289.

sanctions.[327] State and local human rights agencies are often under funded[328] and under staffed.[328] An expanded effort by States and localities would not be intended to supplant Federal civil rights activities, but rather to supplement them. The staffs of the two enforcement systems should work together so as to prevent duplication of effort and to ensure maximum utilization of information.

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[327] This Commission has urged that:

> States and their subdivisions must, at a minimum, enact laws which provide for their citizens the same level of protection offered by Federal statutes, executive orders, court decisions, and executive policy pronouncements ....
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> These laws must not only be broad in coverage but also must provide for effective enforcement. An enforcement agency must be established having the power not only to investigate complaints and issue opinions, but also to conduct investigations on its own initiative, hold hearings, issue subpoenas and cease and desist orders, seek court enforcement of its orders, initiate and intervene in litigation, levy civil penalties, and order the withholding, where necessary, of State and municipal funds from programs where discrimination is found. "Revenue Sharing Program -- Minimum Civil Rights Requirements," *supra* note 325.

[328] This Commission has commented about the lack of Federal funding where State and local agencies have responsibilities under Federal law for processing complaints. See U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort -- 1974* Vol. II, *To Provide...For Fair Housing* 46 (1974) and Vol. V, *Employment* (in preparation).

[329] This Commission recommended:

> These agencies must be fully staffed with trained, competent personnel. They must not be susceptible to domination by local political factions, but rather, should be permanent, independent agencies whose members are appointed for staggered terms of office. Furthermore, officials in all State and local agencies should be made to understand that it is their responsibility, subject to removal from office, to ensure that their programs are not discriminatory in operation or effect. "Revenue Sharing Program -- Minimum Civil Rights Requirements," *supra* note 325.

FINDINGS AND CONCLUSIONS

1. General revenue sharing, enacted into law by the State and Local Fiscal Assistance Act of 1972, received one of the largest single domestic appropriations in American history.

   a. That Act provides more than 30 billion dollars in financial aid to 39,000 State and local governments, to be used for a very broad range of programs and activities.

   b. The Act provides that no one shall be discriminated against on the grounds of race, color, national origin, or sex in employment or distribution of benefits under any program or activity funded in whole or in part with GRS funds.

   c. Responsibility for overall administration of the Act lies with the Office of Revenue Sharing (ORS) of the Department of the Treasury.

2. Abundant evidence indicates that discrimination in the employment practices and delivery of benefits of State and local governments is far reaching, often extending to programs funded by general revenue sharing.

3. ORS has not taken adequate steps to ensure that it has sufficient civil rights compliance staff to conduct even a minimally effective civil rights enforcement program.

   a. Although congressional allocations place severe limitations on the size of ORS' compliance staff, ORS has used far too few of its congressionally allocated compliance positions for civil rights specialists.

   b. ORS' delay in filling the compliance positions assigned to it undermined its hiring of civil rights staff.

4. The civil rights duties which have been delegated to ORS under the State and Local Fiscal Assistance Act of 1972 often overlap with those assigned to other Federal agencies under other laws, including Titles VI and VII of the Civil Rights Act of 1964, and yet coordination with other agencies has been inadequate.

   a. ORS has not formally arranged for any other Federal agency's staff to monitor compliance with the civil rights requirement under general revenue sharing.

   b. ORS has met with only a few agencies charged with administering Title VI, and these discussions have been only preliminary.

   c. As of mid-December 1974, ORS had signed only one interagency agreement, namely one which provided that ORS will proceed to seek compliance where the Equal Employment Opportunity Commission has found reasonable cause to believe that discrimination exists.

d. The Department of Justice has written a draft agreement to prevent duplication of its compliance efforts with those of ORS, but even this agreement has not been concluded.

5. The portion of ORS' regulation relating to civil rights does not set forth in an adequate manner what is required by ORS and recipient governments to ensure nondiscrimination under the Act.

a. It is considerably weaker than Federal agency Title VI regulations. It does not require recipients to take affirmative action or collect civil rights data and it does not require ORS to conduct compliance reviews.

b. ORS' regulation has not made clear to recipients what constitutes discrimination under the Act. Although there is a body of experience under Title VI which could be used to guide recipients, since Title VI does not cover sex discrimination or most employment discrimination, the lack of guidance is particularly serious in those two areas.

6. One problem in the enforcement of the civil rights requirement is that revenue sharing funds may be used to free funds which in turn may be used for discriminatory purposes. ORS has found that it is too difficult to trace the uses of freed-up funds, and thus has no mechanism to ensure against their misuse.

6. ORS has no requirement for the collection and use of racial, ethnic, or sex data, although it has the authority to require such data collection.

a. Data on the race, ethnic origin, and sex of State and local government employees are collected by many GRS recipients to meet requirements of the Equal Employment Opportunity Commission (EEOC), but ORS does not regularly review these data. Therefore, ORS does not know the extent to and the levels at which minorities and women are employed in GRS-funded programs.

b. ORS has not required its recipients to collect or report racial, ethnic, or sex data on applicants, beneficiaries or persons eligible to participate in their programs. Therefore, ORS is not in a position to measure whether benefits of GRS-funded programs are being distributed equitably to minorities and women.

8. ORS has not placed an obligation upon recipients of GRS funds to take affirmative steps to ensure that they do not discriminate against minorities in their employment practices or in their delivery of program benefits.

a. ORS does not require recipients to conduct a self-analysis of deficiencies in employment or delivery of benefits.

b. It does not require its recipients to set goals and timetables to remedy any deficiencies in employment or delivery of services.

9. ORS' procedures for assuring itself of compliance by its recipients have been deficient, having been based during the first 20 months of ORS' existence largely on assurances, one-time compliance visits to about 100 recipients receiving the largest GRS payments, and complaint processing.

a. The assurances consist merely of a form statement signed by the recipients that there will be compliance with the Act.

b. The questions asked on the compliance visits were superficial, relating primarily to recipients' capabilities for achieving compliance rather than to the extent of compliance with the nondiscrimination provision.

c. For many months ORS made no special effort to inform the public how or where to file complaints and as of October 1974, ORS had received only 93 civil rights complaints. Although complaint volume is a poor indicator of civil rights compliance, ORS has cited the low volume of complaints as evidence of compliance. Moreover, ORS has been slow to resolve the complaints it receives and ORS appears to have been willing to consider complaints as resolved without sufficient evidence that the violations uncovered have been corrected.

10. ORS has not conducted any full-scale compliance reviews unrelated to the receipt of complaints of discrimination and ORS does not plan the systematic conduct of such reviews at any time in the near future.

11. ORS intends to rely on audits by State and local governments as the principal means of informing itself about the civil rights compliance status of recipients.

a. The Audit Guide, ORS' only instruction to auditors, is inadequate for telling auditors how to make a meaningful determination of civil rights compliance.

b. ORS had not taken steps to ensure that civil rights components of State and local governments' audits are of acceptable quality.

12. In one instance in which ORS became aware of noncompliance by a recipient which could not be rectified by conciliation it did not on its own initiative take steps to prevent GRS monies from funding that activity and had to be ordered by a court to defer the affected funds.

RECOMMENDATIONS

1. The President should request from Congress for fiscal year 1976 an appropriation of $7.5 million to be used to provide at least 300 additional positions for the civil rights compliance program under general revenue sharing.

2. The President should direct the Secretary of the Treasury to restructure the civil rights compliance program under general revenue sharing by entering into written agreements, prior to the end of fiscal year 1975, with other Federal agencies having civil rights responsibilities which overlap those of ORS, delegating to them the role of monitoring compliance with the civil rights requirements of the State and Local Fiscal Assistance Act and its implementing regulation.

a. ORS should retain responsibility for drafting regulations and guidelines, and taking enforcement action, but should delegate to other agencies such duties as data analysis, complaint investigation, compliance reviews, and negotiations.

b. Delegation of responsibility should be made by subject area; for example, police departments to the Law Enforcement Assistance Administration of the Department of Justice, and health problems to the Department of Health, Education, and Welfare.

c. The interagency agreements should address subh issues as the standards for compliance, scope and frequency of compliance reviews and methodology for complaint investigations.

d. Most of the 300 additional personnel should be employed by the agencies to which ORS' responsibilities are transferred; ORS should have additional civil rights staff only as necessary to implement the responsibilities it retains under the interagency agreements.

3. The President should direct the Department of Justice (DOJ) to take the lead in the immediate development of standards for a Government-wide civil rights compliance program under general revenue sharing. In particular, DOJ should review for approval all ORS civil rights regulations and guidelines and ensure that they set appropriate standards for the conduct of data collection, affirmative action, compliance reviews, and complaint investigations. DOJ should also oversee the delegation by ORS of its civil rights monitoring function to other Federal agencies.

4. ORS should within the next four months publish in final form a revised civil rights portion of its regulation to make clear what is required by the State and Local Fiscal Assistance Act's proscription of discrimination.

   a. ORS should adopt the substantive standards set by the Equal Employment Opportunity Commission, as enunciated in its decisions and various guidelines.

   b. It should detail, in similar guidelines, the actions which constitute sex discrimination in the delivery of program benefits, and are therefore prohibited under the Act.

5. ORS should immediately request a legal opinion from the Attorney General as to whether the difficulty in tracing funds requires the Federal Government to ensure nondiscrimination in all programs of recipients of general revenue sharing. If the Attorney General does not construe present laws as providing such authority, ORS should ask the Congress to give it the power to deal with that problem.

6. An important element in the civil rights compliance program under general revenue sharing should be the regular review of statistical data to ensure that minorities and women are participating equitably in GRS-funded programs and are not underutilized as employees of those programs.

a. ORS should require State and local governments to collect data on the race, ethnic origin, and sex of beneficiaries, applicants, and persons eligible to participate in GRS-funded programs.

b. These data, along with data submitted to the Equal Employment Opportunity Commission on the race, ethnic origin, and sex of State and local government employees, should be analyzed with regularity on a sample basis.

7. ORS should require that each recipient develop an affirmative action program to ensure nondiscrimination in both employment and delivery of benefits in GRS-funded programs.

a. Recipients should be required to conduct analyses of deficiencies in both areas and to set goals and timetables to remedy all deficiencies.

b. ORS should adopt Revised Order No. 4 of the Office of Federal Contract Compliance of the Department of Labor to aid recipients in drafting the portion of the plans relating to employment, and ORS should write guidelines comparable to that order to aid recipients in drafting the portion of the plans relating to benefits.

8. ORS should not continue to regard such superficial compliance tools as assurances and complaint volume as reliable indicators of recipients' compliance status. Moreover, the speed with which civil rights complaints concerning general revenue sharing are handled must be increased.

9. The most important element of civil rights monitoring of general revenue sharing should be the systematic conduct of preaward and postaward compliance reviews. A significant percent of recipients should be reviewed annually, including a sizable number of all types of recipients--States, counties, cities, and towns.

10. ORS should rely upon audits, not as the principal source of information on the compliance status of recipients, but as an indicator of where compliance reviews should be conducted.

a. ORS should revise its Audit Guide so that auditors are directed to obtain and conduct an elemental analysis of all available civil rights information such as racial, ethnic, and sex data, affirmative action plans, lawsuits, and complaints relating to employment and delivery of services in GRS-funded programs.

b. ORS should evaluate the quality of civil rights information being produced by existing audit systems by reviewing for adequacy a random sample of the audits which have been conducted.

11. Where, as a result of an investigation, ORS determines that GRS funds will be used in a program or activity which violates the nondiscrimination provision of the Act and the recipient government will not correct the potential violation, ORS should defer all funds from the recipient.

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